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UNITED STATES REPORTS

VOLUME 339

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1949

FROM FEBRUARY 20, 1950, THROUGH JUNE 5, 1950
(END OF TERM)

WALTER WYATT
REPORTER

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1950

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.*

FRED M. VINSON, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
ROBERT H. JACKSON, Associate Justice.
HAROLD H. BURTON, Associate Justice.
TOM C. CLARK, Associate Justice.
SHERMAN MINTON, Associate Justice.

J. HOWARD McGRATH, Attorney General.
PHILIP B. PERLMAN, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
WALTER WYATT, Reporter.
THOMAS ENNALLS WAGGAMAN, Marshal.
HELEN NEWMAN, Librarian.

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*The proceedings in the Supreme Court on May 8, 1950, in memory of Mr. Chief Justice Hughes are reported in 338 U. S., pp. xiii–xxviii.

74620

SUPREME COURT OF THE UNITED STATES.

Allotment of Justices.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, Fred M. Vinson, Chief Justice.

For the First Circuit, Felix Frankfurter, Associate Justice.

For the Second Circuit, Robert H. Jackson, Associate Justice.

For the Third Circuit, Harold H. Burton, Associate Justice.

For the Fourth Circuit, Fred M. Vinson, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Stanley Reed, Associate Justice.

For the Seventh Circuit, Sherman Minton, Associate Justice.

For the Eighth Circuit, Tom C. Clark, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Tom C. Clark, Associate Justice.

October 14, 1949.

(For next previous allotment, see 337 U. S. p. iv.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1949.

DISTRICT OF COLUMBIA *v.* LITTLE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 302. Argued January 11–12, 1950.—Decided February 20, 1950.

Receiving information that respondent's home was in an unsanitary condition, a health officer went there, without a search warrant, for the purpose of inspecting it. Respondent was away and the door was locked; but she returned while the officer was standing outside the door. She protested his right to enter, claiming that it would violate her constitutional rights, and she refused to unlock the door; but she neither used nor threatened force of any kind. She was convicted of violating a District of Columbia regulation making it a misdemeanor to interfere with or prevent the inspection of any building reported to be in an unsanitary condition. *Held:*

1. Respondent's mere refusal to unlock the door on substantial constitutional grounds was not the kind of interference prohibited by the regulation. Pp. 4–7.

2. The foregoing conclusion makes it unnecessary to decide whether the Fourth Amendment forbade the health officer to enter respondent's home without a search warrant. Pp. 3–4.

85 U. S. App. D. C. 242, 178 F. 2d 13, affirmed on other grounds.

Respondent was convicted of violating a District of Columbia regulation making it a misdemeanor to interfere with or prevent the inspection of a building reported to be in an unsanitary condition. The Municipal Court of Appeals of the District of Columbia reversed on con-

stitutional grounds. 62 A. 2d 874. The Court of Appeals affirmed. 85 U. S. App. D. C. 242, 178 F. 2d 13. This Court granted certiorari. 338 U. S. 866. *Affirmed on other grounds,* p. 7.

Chester H. Gray argued the cause for petitioner. With him on the brief were *Vernon E. West, Lee F. Dante* and *Edward A. Beard.*

By special leave of Court, *Anne X. Alpern* argued the cause for the National Institute of Municipal Law Officers, as *amicus curiae,* urging reversal. With her on the brief were *John P. McGrath, Ray L. Chesebro, Benjamin S. Adamowski, Alexander G. Brown* and *Charles S. Rhyne.*

Jeff Busby argued the cause and filed a brief for respondent.

Mr. Justice Black delivered the opinion of the Court.

An information was filed against the respondent Geraldine Little in the Municipal Court for the District of Columbia charging that she had interfered with a District Health Department inspector in the performance of his official duties. The evidence showed that respondent had told the health officer, who had no search warrant, not to enter her home to inspect its sanitary condition; she had also refused to unlock her door. She was convicted and fined $25. The Municipal Court of Appeals reversed, holding that the Fourth Amendment's prohibition against unreasonable searches and seizures forbade the health officer to enter respondent's private home without a search warrant. 62 A. 2d 874. The United States Court of Appeals for the District of Columbia Circuit affirmed on the same grounds. 85 U. S. App. D. C. 242, 178 F. 2d 13. The case raises important questions concerning legal provisions for protecting the health of the people by special and periodic inspection

and elimination of potential sources of disease. We granted certiorari, 338 U. S. 866.

In this Court the constitutional arguments have extended far beyond the comparatively narrow issues involved in the particular case. At one extreme the District argues that the Fourth Amendment has no application whatever to inspections and investigations made by health officers; that to preserve the public health, officers may without judicial warrants enter premises, public buildings and private residences at any reasonable hour, with or without the owner's consent. At the opposite extreme, it is argued that no sanitary inspection can ever be made by health officers without a search warrant, except with a property owner's consent. Between these two extremes are suggestions that the Fourth Amendment requires search warrants to inspect premises where the object of inspections is to obtain evidence for criminal punishment or where there are conditions imminently dangerous to life and health, but that municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants. An impressive array of facts is also presented concerning the uniform practices of agencies of local governments to provide for such general routine inspections in connection with sanitation, plumbing, buildings, etc.

Neither the facts of this case, nor the District law on which the prosecution rests, provide a basis for a sweeping determination of the Fourth Amendment's application to all these varied types of investigations, inspections and searches. Yet a decision of the constitutional requirement for a search in this particular case might have far-reaching and unexpected implications as to closely related questions not now before us. This is therefore an appropriate case in which to apply our sound general policy against deciding constitutional questions if the record

permits final disposition of a cause on non-constitutional grounds. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–575, and cases there cited. Applying this policy, we find it unnecessary to decide whether the Fourth Amendment required a search warrant here. For even if the Health Officer had a lawful right to inspect the premises without a warrant, we are persuaded that respondent's statements to the officer were not an "interference" that made her guilty of a misdemeanor under the controlling District law.[1]

The District regulation which respondent was convicted of violating is set out in part below.[2] It requires

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[1] The lower courts, apparently preoccupied with the constitutional issue, did not refer to this question. Ordinarily we would hesitate to decide questions of District law on which the courts of the District have not spoken. See, *e. g.*, *Griffin* v. *United States*, 336 U. S. 704, 718, and cases there cited. Here, however, the interpretative question is so enmeshed with constitutional issues that complete disposition by this Court is in order.

[2] "2. That it shall be the duty of every person occupying any premises, or any part of any premises, in the District of Columbia, or if such premises be not occupied, of the owner thereof, to keep such premises or part . . . clean and wholesome; if, upon inspection by the Health Officer or an Inspector of the Health Department it be ascertained that any such premises, or any part thereof, or any building, yard, . . . is not in such condition as herein required, the occupant or occupants of such premises or part, or the owner thereof, as hereinbefore specified, shall be notified thereof and required to place the same in a clean and wholesome condition; and in case any person shall fail or neglect to place such premises or part in such condition within the time allowed by said notice he shall be liable to the penalties hereinafter provided.

. . . . .

"10. That the Health Officer shall examine or cause to be examined any building supposed or reported to be in an unsanitary condition, and make a record of such examination; . . . .

. . . . .

"12. That any person violating, or aiding or abetting in violating, any of the provisions of these regulations, or interfering with or

that occupants of premises in the District shall keep them "clean and wholesome"; that Health Officers shall "examine or cause to be examined any building supposed or reported to be in an unsanitary condition"; and that "any person violating . . . any of the provisions of these regulations, or interfering with or preventing any inspection authorized thereby, shall be deemed guilty of a misdemeanor . . . ." An occupant of respondent's house reported to the Health Officer that conditions inside her home were very far from "clean and wholesome." [3] The Health Officer then went to respondent's home. She was away and the door was locked. The officer had no search warrant. While he was standing outside the door, respondent returned. She protested the right of the inspector to enter her private home, claiming that his entry would violate her constitutional rights. She neither used nor threatened force of any kind.[4] In view of these facts found by the courts below, the question boils down to whether respondent's mere refusal to unlock

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preventing any inspection authorized thereby, shall be deemed guilty of a misdemeanor, and shall, upon conviction in the Police Court, be punished by a fine of not less than $5 nor more than $45." Commissioners' Regulations Concerning the Use and Occupancy of Buildings and Grounds, promulgated April 22, 1897, amended July 28, 1922.

[3] The complaint was that "there was an accumulation of loose and uncovered garbage and trash in the halls of said premises and that certain of the persons residing therein had failed to avail themselves of the toilet facilities."

[4] There was evidence that some distance away from the home respondent attempted to grab some papers from the officer. The Municipal Court of Appeals and the Court of Appeals for the District both held that the information on which respondent was convicted was not based on this incident. Those courts and the Municipal Court in which respondent was convicted all treated the conviction as having been based on respondent's refusal to unlock the door on the ground that the officer was without constitutional right to enter.

the door accompanied by remonstrances on substantial constitutional grounds was the kind of interference prohibited by the regulation.[5] We hold that it was not.

Although force or threatened force is not always an indispensable ingredient of the offense of interfering with an officer in the discharge of his duties, mere remonstrances or even criticisms of an officer are not usually held to be the equivalent of unlawful interference.[6] Nor does any express language in the District regulation controlling here impose any duty on home owners to assist health officers to enter and inspect their homes. It does not even prohibit "hindering" or "refusing to permit any lawful inspection," in sharp contrast with a separate inspection statute enacted by Congress for the District which adds these phrases to prohibitions against "interference" and "prevention."[7] The word "interfere" in

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[5] The information charged that respondent "did . . . hinder, obstruct, and interfere with an inspector of the Health Department . . . ." The regulation on which the prosecution was based does not include the words "hinder" and "obstruct." These words do appear in an Act of Congress which provides for an abatement of nuisances in the District and specifically authorizes persons delegated by the District Commissioners to enter premises "during all reasonable hours, to inspect the same and to do whatever may be necessary to correct" a condition amounting to a nuisance. 34 Stat. 115. But that Act is not involved in this case.

[6] See cases collected in Notes, 48 A. L. R. 746, 749, 755; Ann. Cas. 1914B, 814.

[7] "SEC. 11. That no person shall interfere with any member of the board for the condemnation of insanitary buildings or with any person acting under authority and by direction of said board in the discharge of his lawful duties, nor hinder, prevent, or refuse to permit any lawful inspection or the performance of any work authorized by this Act to be done by or by authority and direction of said board." 34 Stat. 157, 159.

There is another interesting difference between the above statute and the regulation here involved. The statute expressly limits inspection to the hours between 8 a. m. and 5 p. m.; the regulation has

this regulation cannot fairly be interpreted to encompass respondent's failure to unlock her door and her remonstrances on constitutional grounds.

Had the respondent not objected to the officer's entry of her house without a search warrant, she might thereby have waived her constitutional objections.[8] The right to privacy in the home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more than respondent did here. The judgment of the Court of Appeals affirming the Municipal Court of Appeals judgment setting aside the conviction is

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BURTON, with whom MR. JUSTICE REED concurs, dissenting.

If this Court is to interpret an ordinance of the District of Columbia, it seems to me that the action of the respondent was an effective interference with an inspector of the District Health Department in the performance of his official duties, and that such conduct of the respondent violated the ordinance that is before us. In my opinion, also, the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant as is required by the Fourth

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no limitation of this or indeed of any other type, though petitioner admits that a requirement of "reasonableness" should be read into it. See also 49 Stat. 1917, 1919, § 10.

[8] See collections cited in note 6 *supra*.

Amendment to protect the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.

Accordingly, the conviction of the respondent should be sustained, and the judgment of the United States Court of Appeals affirming the judgment of the Municipal Court of Appeals setting aside that conviction should be reversed.

SOLESBEE *v.* BALKCOM, WARDEN.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 77. Argued November 15, 1949.—Decided February 20, 1950.

Where a state policy is against execution of a condemned convict who has become insane after conviction and sentence, it is not a denial of due process under the Fourteenth Amendment to vest discretionary authority in the Governor (aided by physicians) to determine whether a condemned convict has become insane after sentence and, if so, whether he should be committed to an insane asylum—even though the Governor's decision is not subject to judicial review and the statute makes no provision for an adversary hearing at which the convict may appear in person or by counsel or through friends and cross-examine witnesses and offer evidence. Pp. 9–14.

205 Ga. 122, 52 S. E. 2d 433, affirmed.

In a habeas corpus proceeding, a Georgia trial court sustained the constitutional validity of Ga. Code § 27–2602, which leaves determination of sanity after conviction of a capital offense to the Governor supported by the report of physicians. The Supreme Court of Georgia affirmed. 205 Ga. 122, 52 S. E. 2d 433. On appeal to this Court, *affirmed,* p. 14.

Benjamin E. Pierce argued the cause and filed a brief for appellant.

Eugene Cook, Attorney General of Georgia, submitted on brief for appellee. With him on the brief were *Claude Shaw,* Deputy Assistant Attorney General, and *J. R. Parham,* Assistant Attorney General.

Mr. Justice Black delivered the opinion of the Court.

Petitioner was convicted of murder in a Georgia state court. His sentence was death by electrocution. Subsequently he asked the Governor to postpone execution

on the ground that after conviction and sentence he had become insane. Acting under authority granted by § 27–2602 of the Georgia Code [1] the Governor appointed three physicians who examined petitioner and declared him sane. Petitioner then filed this habeas corpus proceeding again alleging his insanity. He contended that the due process clause of the Fourteenth Amendment required that his claim of insanity after sentence be originally determined by a judicial or administrative tribunal after notice and hearings in which he could be represented by counsel, cross-examine witnesses and offer evidence. He further contended that if the tribunal was administrative its findings must be subject to judicial review. The trial court sustained the constitutional validity of § 27–2602, holding that determination of petitioner's sanity by the Governor supported by the report of physicians had met the standards of due process. The State Supreme Court affirmed, 205 Ga. 122, 52 S. E. 2d 433. The constitutional questions being substantial, see *Phyle* v. *Duffy*, 334 U. S. 431, 439, the case is here on appeal under 28 U. S. C. § 1257 (2).

In affirming, the State Supreme Court held that a person legally convicted and sentenced to death had no statutory or constitutional right to a judicially conducted

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[1] "Disposition of insane convicts. . . . Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose; and said physicians shall report to the Governor the result of their investigation; and the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force. . . ." Ga. Code Ann. § 27–2602 (1074 P. C.); Acts 1903, p. 77.

or supervised "inquisition or trial" on the question of insanity subsequent to sentence.[2] It viewed the Georgia statutory procedure for determination of this question as motivated solely by a sense of "public propriety and decency"—an "act of grace" which could be "bestowed or withheld by the State at will" and therefore not subject to due process requirements of notice and hearing. The court cited as authority, among others, our holding in *Nobles* v. *Georgia,* 168 U. S. 398. Compare *Burns* v. *United States,* 287 U. S. 216, 223.

In accordance with established policy we shall not go beyond the constitutional issues necessarily raised by this record. At the outset we lay aside the contention that execution of an insane person is a type of "cruel and unusual punishment" forbidden by the Fourteenth Amendment. See *Francis* v. *Resweber,* 329 U. S. 459. For the controlling Georgia statutes neither approve the practice of executing insane persons, nor is this petitioner about to be executed on such a premise. It is suggested that the reasoning of the Georgia Supreme Court in this case requires us to pass upon the state statute as though it had established a state practice designed to execute persons while insane. But we shall not measure the statute by some possible future application. Our holding is limited to the question of whether the method applied by Georgia here to determine the sanity of an already convicted defendant offends due process.

Postponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general. The power to reprieve has usually sprung from the same source as the power to

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[2] "No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity." Ga. Code Ann. § 27–2601 (1073 P. C.); Acts 1903, p. 77.

pardon. Power of executive clemency in this country undoubtedly derived from the practice as it had existed in England. Such power has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom, if ever, has this power of executive clemency been subjected to review by the courts. See *Ex parte United States,* 242 U. S. 27, 42, and cases collected in Note, 38 L. R. A. 577, 587.

We are unable to say that it offends due process for a state to deem its Governor an "apt and special tribunal" [3] to pass upon a question so closely related to powers that from the beginning have been entrusted to governors. And here the governor had the aid of physicians specially trained in appraising the elusive and often deceptive symptoms of insanity. It is true that governors and physicians might make errors of judgment. But the search for truth in this field is always beset by difficulties that may beget error. Even judicial determination of sanity might be wrong.

Recently we have pointed out the necessary and inherent differences between trial procedures and post-conviction procedures such as sentencing. *Williams* v. *New York,* 337 U. S. 241. In that case we emphasized that certain trial procedure safeguards are not applicable to the process of sentencing. This principle applies even more forcefully to an effort to transplant every trial safeguard to a determination of sanity after conviction. As was pointed out in the *Nobles* case, *supra,* to require judicial review every time a convicted defendant suggested insanity would make the possibility of carrying out a sentence depend upon "fecundity in making suggestion after suggestion of insanity." *Nobles*

[3] *Nobles* v. *Georgia,* 168 U. S. 398, 409.

v. *Georgia, supra,* at 405–406. See also *Phyle* v. *Duffy, supra.* To protect itself society must have power to try, convict, and execute sentences. Our legal system demands that this governmental duty be performed with scrupulous fairness to an accused. We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn responsibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved.

This leaves the contention that the Georgia statutes do not make provisions for an adversary hearing in which a convicted defendant can be present by friends, attorneys, or in person, with the privilege of cross-examining witnesses and offering evidence. Whether this Governor declined to hear any statements on petitioner's behalf, this record does not show. We would suppose that most if not all governors, like most if not all judges, would welcome any information which might be suggested in cases where human lives depend upon their decision.

Both the *Nobles* and the *Phyle* cases stand for the universal common-law principle that upon a suggestion of insanity after sentence, the tribunal charged with responsibility must be vested with broad discretion in deciding whether evidence shall be heard. This discretion has usually been held nonreviewable by appellate courts.[4] The heart of the common-law doctrine has been that a suggestion of insanity after sentence is an appeal to the conscience and sound wisdom of the particular tribunal which is asked to postpone sentence. We cannot say that the trust thus reposed in judges should be denied governors, traditionally charged with saying the last word that spells life or death. There is no indication

[4] See cases collected in Notes, Ann. Cas. 1916E, 424 *et seq.;* 49 A. L. R. 801 *et seq.;* 38 L. R. A. 577 *et seq.*

that either the Governor or the physicians who acted on petitioner's application violated the humanitarian policy of Georgia against execution of the insane. We hold that the Georgia statute as applied is not a denial of due process of law.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, dissenting.

In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon. The legal problems which such supervening insanity raises happily do not involve explorations of the pathological processes which give rise to the conflict between so-called legal and medical insanity. See *M'Naghten's Case,* 10 Cl. & F. 200 (1843); Glueck, Mental Disorder and the Criminal Law *passim* (1925); Minutes of Evidence before the 1949 Royal Commission on Capital Punishment. The case now before the Court presents a familiar constitutional issue placed in the setting of a claim of supervening insanity.

The question is this: may a State without offending the Due Process Clause of the Fourteenth Amendment put to death one on whose behalf it is claimed that he became insane while awaiting execution, if all opportunity to have his case put is denied and the claim of supervening insanity is rejected on the basis of an *ex parte* inquiry by the Governor of the State? This issue was before the Court very recently, but in the circumstances the matter was not ripe for decision. *Phyle* v. *Duffy,* 334 U. S. 431. On the record before us the issue must be met. Unlike the situation in *Phyle* v. *Duffy,* it cannot be urged that the Georgia judgment under

review leaves open the opportunity for a hearing which was given when *Phyle* v. *Duffy* went back to the California courts. 34 Cal. 2d 144, 208 P. 2d 668. We cannot avoid now deciding whether one awaiting electrocution who makes a substantial claim that he has become insane can be denied opportunity to address the mind of the Governor, or those who advise him, in order to establish the fact of such insanity. In *Phyle's* case, the Court recognized "the gravity of the questions here raised under the due process clause." 334 U. S. at 439. Apparently between June 1948 and today the gravity seems to have been dispelled. These grave questions are now almost summarily answered. It cannot be due to the weightiness of the argument presented at the bar of this Court for none was made here by Georgia, and its slight brief hardly discusses the problems.

The immediate question before us depends on the view one takes of the legal right of a State to execute a person become insane after sentence. If the Due Process Clause of the Fourteenth Amendment does not bar the State from infliction of the death sentence while such insanity persists, of course it need make no inquiry into the existence of supervening insanity. If it chooses to make any inquiry it may do so entirely on its own terms. If the Due Process Clause does limit the State's power to execute such an insane person, this Court must assert the supremacy of the Due Process Clause and prohibit its violation by a State.

The Court in an easy, quick way puts this crucial problem to one side as not before us. But in determining what procedural safeguards a State must provide, it makes all the difference in the world whether the United States Constitution places a substantive restriction on the State's power to take the life of an insane man. If not to execute is merely a benevolent withholding of the

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right to kill, the State may exercise its benevolence as it sees fit. But if Georgia is precluded by the Due Process Clause from executing a man who has temporarily or permanently become insane, it is not a matter of grace to assert that right on behalf of the life about to be taken. If taking life under such circumstances is forbidden by the Constitution, then it is not within the benevolent discretion of Georgia to determine how it will ascertain sanity. Georgia must afford the rudimentary safeguards for establishing the fact. If Georgia denies them she transgresses the substance of the limits that the Constitution places upon her.

Does the Due Process Clause then bar a State from executing a man under sentence of death while insane? It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large, untechnical concept as "due process," the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions.

That it offends our historic heritage to kill a man who has become insane while awaiting sentence cannot be gainsaid. This limitation on the power of the State to take life has been part of our law for centuries, recognized during periods of English history when feelings were more barbarous and men recoiled less from brutal

action than we like to think is true of our time. Due process is itself "a historical product," *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31, and it requires no expansion of its purposes to find in the Fourteenth Amendment a restriction upon State action that carries such impressive credentials of history as does that forbidding the State to kill an insane man though under sentence of death:

> "It was further provided by the said Act of 33 H. 8. that if a man attainted of treason became mad, that notwithstanding he should be executed; which cruell and inhumane law lived not long, but was repealed, for in that point also it was against the common law, because by intendment of law the execution of the offender is for example, *ut poena ad paucos, metus ad omnes perveniat,* as before is said: but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others." Coke, Third Institutes 6 (1644).
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> "And it seems agreed at this Day, That if one who has committed a capital Offence, become *Non Compos* before Conviction, he shall not be arraigned; and if after Conviction, that he shall not be executed." 1 Hawkins, Pleas of the Crown 2 (1716).
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> ". . . for nothing is more certain in Law, than that a Person who falls mad after a Crime suppos'd to be committed, shall not be try'd for it; and if he fall mad after Judgment, he shall not be executed: tho I do not think the reason given for the Law in that Point will maintain it, which is, that the End of Punishment is the striking a Terror into others, but the execution of a Madman had not that effect; which is not true, for the Terror to the

living is equal, whether the Person be mad or in his Senses . . . But the true reason of the Law I think to be this, a Person of *non sana Memoria,* and a Lunatick during his Lunacy, is by an Act of God (for so it is call'd, tho the means may be humane, be it violent, as hard Imprisonment, terror of Death, or natural, as Sickness) disabled to make his just Defence, there may be Circumstances lying in his private Knowledg, which would prove his Innocency, of which he can have no advantage, because not known to the Persons who shall take upon them his Defence . . . .

. . . . .

"The King is therefore no otherwise benefited by the destruction of his Subjects, than that the Example deters others from committing the like Crimes; and there being so many to be made Examples of, besides those on whom the misfortunes of Madness fall, it is inconsistent with humanity to make Examples of them; it is inconsistent with Religion, as being against Christian Charity to send a great Offender quick, as it is stil'd, into another World, when he is not of a capacity to fit himself for it. But whatever the reason of the Law is, it is plain the Law is so . . . ." Remarks on the Tryal of Charles Bateman by Sir John Hawles, Solicitor-General in the reign of King William III, 3 State-Tryals 651, 652–53 (1719).

"If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment . . . And if such person after his plea, and

> before his trial, become of *non sane memory,* he shall not be tried; or, if after his trial he become of *non sane memory,* he shall not receive judgment; or, if after judgment he become of *non sane memory,* his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution." 1 Hale, The History of the Pleas of the Crown 34–35 (1736).[1]
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> "Another cause of regular reprieve is, if the offender become *non compos* . . . if after judgment, he shall not be ordered for execution: for *'furiosus solo furore punitur,'* and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings." 4 Bl. Comm. 388–89 (1769).

However quaint some of these ancient authorities of our law may sound to our ears, the Twentieth Century has not so far progressed as to outmode their reasoning. We should not be less humane than were Englishmen in the centuries that preceded this Republic.[2] And the practical considerations are not less relevant today than they were when urged by Sir John Hawles and Hale and Hawkins and Blackstone in writings which nurtured so many founders of the Republic. If a man has gone insane, is he still himself? Is he still the man who was convicted? In any event "were he of sound memory, he might allege somewhat" to save himself from doom. It is not an idle fancy that one under sentence of death ought not, by becoming *non compos,* be denied the means to "allege somewhat" that might free him. Such an

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[1] The first publication of Hale's *Pleas of the Crown* was of course based upon the manuscript left by him at his death in 1676. See 6 Holdsworth, A History of English Law 574, 589–90 (1924).

[2] See Report of the Committee on Insanity and Crime, Cmd. No. 2005, pp. 17, 19 (1923).

opportunity may save life, as the last minute applications to this Court from time to time and not always without success amply attest.[3]

The short of it is that American law is not more brutal than what is revealed as the unbroken command of English law for centuries preceding the separation of the Colonies. The Court puts out of sight, as it were, what is basic to a disposition of this case, namely, that not a State in the Union supports the notion that an insane man under sentence of death would legally be executed. If respect is to be given to claims so deeply rooted in our common heritage as this limitation upon State power, the Fourteenth Amendment stands on guard to enforce it.

Unless this restriction on State power is fully recognized and its implications are duly respected, the crucial questions presented by this case are avoided. We are here not dealing with the Crown's prerogative of mercy continued through the pardoning power in this country as an exercise of grace. See *Ex parte Grossman,* 267 U. S. 87. Nor are we dealing with the range of discretion vested in judges by penal laws carrying flexible instead of fixed penalties. See *Williams* v. *New York,* 337 U. S. 241. We are dealing with a restriction upon the States against taking life if a certain fact is established, to-wit, insanity,

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[3] Insane persons do not have the capacity to plead or be tried. See *Youtsey* v. *United States,* 97 F. 937; *Forthoffer* v. *Swope,* 103 F. 2d 707. After sentence of death, the test of insanity is whether the prisoner has not "from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court." *In re Smith,* 25 N. M. 48, 59, 176 P. 819, 823. See also *People* v. *Geary,* 298 Ill. 236, 131 N. E. 652; *In re Grammer,* 104 Neb. 744, 178 N. W. 624.

like unto other restrictions upon the State in taking liberty or property. In view of the Due Process Clause it is not for the State to say: "I choose not to take life if a man under sentence becomes insane." The Due Process Clause says to a State: "Thou shalt not."

And so we come to the implications of this constitutional restriction upon a State in order to determine whether it can deny all opportunity to lay before some agency of government facts and circumstances which, if true, must stay the executioner's hand.

The manner in which the States have dealt with this problem furnishes a fair reflex, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons who become insane while under sentence of death.

Six States no longer have the death penalty. (See Appendix, Part A.) As to the remaining 42:

I. In 30 States, execution of the death penalty is suspended upon a determination of insanity supervening after sentence.
   (a) Of these, 9 States provide (5 by statute and 4 under common law) that the inquiry shall be entirely judicial. (Part B.)
   (b) Of these, 14 States provide for the ultimate determination of sanity or insanity by a judge or jury after a hearing, upon initiation of the hearing by a designated prison or police official.
      (1) Of these, 2 States provide for judicial review of the official's decision not to initiate a hearing. (Part C–I.)
      (2) Of these, 12 States have no legislation or adjudication defining whether the official's decision is subject to review. (Part C–II.)

(c) Of these, 7 States provide for the ultimate determination of sanity by the Governor or by a body of physicians and laymen.

(1) Of these, 1 State appears to afford an opportunity to be heard. (Part D–I.)

(2) Of these, 3 States appear to provide for an *ex parte* inquiry. (Part D–II.)

(3) Of these, 3 States have no provision indicating the nature of the inquiry. (Part D–III.)

II. In 3 States, suspension of execution of the death penalty because of insanity is at the discretion of the Governor. (Part E.)

III. As to 9 States, the available legislation and decisions afford no clear basis for classification. Of these, 4 give strong indications that execution of the death penalty is suspended upon insanity supervening after sentence,[4] 3 offer insufficient material even for inference, and 2 offer no relevant material. (Part F.)

We start with the fact that not a single State gives any indication of having uprooted the heritage of the common law which deemed it too barbarous to execute a man while insane. This brings us to the mode of establishing the crucial basis for the lawful killing by a State, namely, that it kill not an insane person. Nine States make the necessary inquiry entirely judicial. Fourteen more States put the responsibility for initiating judicial inquiry, with various alternatives of judge and jury, upon an appropriate official. In ten States the determination of sanity is vested in the Governor either with or with-

[4] In these 4 States, 3 have statutory provisions dealing with insanity after conviction but before sentence, and 1 has a provision dealing with insanity after conviction. Compare *State* v. *Allen*, 204 La. 513, 15 So. 2d 870.

out the aid of advisors or in a separate administrative board. But even as to these, in only six States, including Georgia, is it clear that such an inquiry may be entirely behind closed doors without any opportunity for submission of facts on behalf of the person whose sanity is to be determined as a prerequisite to killing him.

This impressive body of State legislation signifies more than the historic continuity of our repulsion against killing an insane man even though he be under sentence of death. The vindication of this concern turns on the ascertainment of what is called a fact, but which in the present state of the mental sciences is at best a hazardous guess however conscientious. If the deeply rooted principle in our society against killing an insane man is to be respected, at least the minimum provision for assuring a fair application of that principle is inherent in the principle itself. And the minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.

This is a requirement that this Court has enforced again and again when mere interests of property were involved. See *e. g., Pennoyer* v. *Neff,* 95 U. S. 714; *Priest* v. *Trustees of Las Vegas,* 232 U. S. 604. It cannot be that the Court is more concerned about property losses that are not irremediable than about irretrievable human claims. If, as was held only the other day, due process saves a man from being sent to jail for sixty days on a charge of contempt because he was tried in secret, *In re Oliver,* 333 U. S. 257, due process ought also to vindicate the self-respect of society by not sending a man to his death on the basis of a proceeding as to his sanity in which all opportunity on his behalf has been denied to

show that he is in fact in that condition of insanity which bars the State from killing him. He should not be denied the opportunity to inform the mind of the tribunal—be it a Governor, a board or a judge—that has to decide between life and death, not as a matter of grace but on the basis of law. For if he be insane his life cannot be forfeit except in violation of the law of the land.

If a man "is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged" before being convicted, *In re Oliver, supra* at 272, he should no less be allowed to have someone speak for him when the issue is not merely a prerogative of mercy or the exercise of discretion which modern penological thought, translated into legislation, vests in judges in imposing sentence. The killing of an insane man under sentence, it needs to be repeated, is in our law not a matter of discretion. Not to kill such an insane man "has its roots in our English common law heritage" no less deep than not to convict him without a hearing. See *In re Oliver, supra* at 266. The rule against killing an insane person embedded so deeply in our law as to be protected by substantive aspects of due process requires as part of procedural due process that the victim be given an opportunity through counsel or the next of kin to invoke the substantive principle of due process.

Since it does not go to the question of guilt but to its consequences, the determination of the issue of insanity after sentence does not require the safeguards of a judicial proceeding. See *Ng Fung Ho* v. *White*, 259 U. S. 276, 284–85. Nor need the proceeding be open; it may be *in camera*. But precisely because the inquiry need not be open and may be made *in camera*, it must be fair in relation to the issue for determination. In the present state of the tentative and dubious knowl-

edge as to mental diseases and the great strife of schools in regard to them, it surely operates unfairly to make such determinations not only behind closed doors but without any opportunity for the submission of relevant considerations on the part of the man whose life hangs in the balance.

To say that an inquiry so conducted is unfair because of the treacherous uncertainties in the present state of psychiatric knowledge is not to impugn the good faith of Governors or boards in excluding what is sought to be put before them on behalf of a putative insane person. The fact that a conclusion is reached in good conscience is no proof of its reliability. The validity of a conclusion depends largely on the mode by which it was reached. A Governor might not want to have it on his conscience to have sent a man to death after hearing conflicting views, equally persuasive, regarding the man's sanity. Claims obviously frivolous need of course not be heard, even as this Court does not listen to claims that raise no substantial question. It is not suggested that petitioner's claim of insanity was baseless.

It is a groundless fear to assume that it would obstruct the rigorous administration of criminal justice to allow the case to be put for a claim of insanity, however informal and expeditious the procedure for dealing with the claim. The time needed for such a fair procedure could not unreasonably delay the execution of the sentence unless in all fairness and with due respect for a basic principle in our law the execution should be delayed. The risk of an undue delay is hardly comparable to the grim risk of the barbarous execution of an insane man because of a hurried, one-sided, untested determination of the question of insanity, the answers to which are as yet so wrapped in confusion and conflict and so dependent on elucidation by more than one-sided partisanship.

To deny all opportunity to make the claim that was here made on behalf of the petitioner is in my view a denial of due process of law.

APPENDIX TO OPINION OF FRANKFURTER, J.

State legislation and judicial decisions concerning execution of death penalty where insanity supervenes after sentence.[1]

A. States in which problem does not arise because they have no death penalty: [2]

(1) Me. Rev. Stat. c. 117, § 1 (1944).
(2) Mich. Comp. Laws § 750.316 (1948).
(3) Minn. Stat. § 619.07 (Henderson 1945).
(4) N. D. Rev. Code § 12–2713 (1943).[3]
(5) R. I. Gen. Laws c. 606, § 2 (1938).[3]
(6) Wis. Stat. § 340.02 (1947).

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[1] It is appropriate to give warning that the meaning attributed to some of the statutes cited in this Appendix does not have the benefit of guiding State adjudication and that, even when such adjudication is available to throw light on statutory meaning or on the State's common law, classification has been based on judicial pronouncements which are not always explicit holdings. The ascertainment of the law of a State when there is not a clear ruling by the highest court of that State is treacherous business. It should also be added that while this Appendix is based on the latest legal materials in the Library of this Court that is no guarantee that there may not be still later relevant local materials.

[2] The statutes cited give the penalty for first degree murder. See also Grünhut, Penal Reform 7 (1948).

[3] The penalty for first degree murder is life imprisonment unless a person is under sentence of life imprisonment at the time of conviction.

B. States suspending execution of death penalty under statutory or common law provisions for hearing before judge or judge and jury upon initiation by judge: [4]

I. Statutory procedure:

(7) Ala. Code Ann. tit. 15, § 427 (1940).

(8) Colo. Stat. Ann. c. 48, §§ 6, 7 (1935). See *Bulger* v. *People,* 61 Colo. 187, 156 P. 800.

(9) Ill. Rev. Stat. c. 38, §§ 593–94 (1949). See *People* v. *Geary,* 298 Ill. 236, 131 N. E. 652; *People* v. *Preston,* 345 Ill. 11, 177 N. E. 761.

(10) La. Code Crim. Law & Proc. Ann. art. 267 (1943). See *State* v. *Allen,* 204 La. 513, 15 So. 2d 870, 18 Tulane L. Rev. 497; *State* v. *Gunter,* 208 La. 694, 23 So. 2d 305; *State* v. *Hebert,* 187 La. 318, 174 So. 369; La. Laws 1918, No. 261, p. 483.

(11) N. J. Stat. Ann. § 2:193–12 (1939) in connection with *In re Lang,* 77 N. J. L. 207, 71 A. 47; *In re Herron,* 77 N. J. L. 315, 72 A. 133; 79 N. J. L. 67, 73 A. 599.

II. Common law procedure:

(12) North Carolina. See *State* v. *Vann,* 84 N. C. 722, 724; *State* v. *Godwin,* 216 N. C. 49, 3 S. E. 2d 347; *State* v. *Sullivan,* 229 N. C. 251, 49 S. E. 2d

[4] In all States providing for suspension of death penalty upon supervening insanity, the procedural problem raises two questions: (1) who shall decide whether there has been a sufficient *prima facie* showing of insanity to warrant initiation of a further proceeding; (2) who shall be the fact finder in such proceeding.

458. See also N. C. Gen. Stat. Ann. §§ 122–84, 122–85 (Supp. 1949).

(13) South Carolina. See *State* v. *Bethune,* 88 S. C. 401, 71 S. E. 29. See also S. C. Code Ann. § 6239 (1942).

(14) Tennessee. See *Jordan* v. *State,* 124 Tenn. 81, 90–91, 135 S. W. 327, 329–30; *Bonds* v. *State,* 8 Tenn. 142. See also Tenn. Code Ann. §§ 4476, 4502 (Williams 1934).

(15) Washington. See *State* v. *Nordstrom,* 21 Wash. 403, 58 P. 248; *Grossi* v. *Long,* 136 Wash. 133, 238 P. 983; *State ex rel. Alfani* v. *Superior Court,* 139 Wash. 125, 245 P. 929; *State* v. *Davis,* 6 Wash. 2d 696, 717, 108 P. 2d 641, 650–51.

C. States suspending execution of death penalty under statutory provisions for hearing before judge or jury upon initiation by designated prison or police official: [5]

I. Official's refusal to initiate subject to judicial review:

(16) Ark. Stat. Ann. §§ 41–109, 43–2622 (1947). See *Howell* v. *Kincannon,* 181 Ark. 58, 24 S. W. 2d 953; *Howell* v. *Todhunter,* 181 Ark. 250, 25 S. W. 2d 21; *Shank* v. *Todhunter,* 189 Ark. 881, 75 S. W. 2d 382.

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[5] See note 4 *supra.* Most of the States in Parts C and D require the official responsible for initiating the further inquiry to act if there is "good reason," or a like ground, for believing that the convicted man is insane. In some of these States the relevant statute provides that the official "may" act where "good reason" exists, thereby raising the familiar problem as to when "may," considering its function, means "must" in legislative English. Compare *Howell* v. *Todhunter,* 181 Ark. 250, 25 S. W. 2d 21.

(17) Cal. Pen. Code §§ 1367, 3701–03 (1949). See *Phyle* v. *Duffy,* 34 Cal. 2d 144, 208 P. 2d 668.

II. Whether official's refusal to initiate inquiry is subject to review undefined by legislation or adjudication:

(18) Idaho Code Ann. §§ 19–2709 to 19–2712, 19–3301 (1948).

(19) Ky. Rev. Stat. § 431.240 (1948). See Ky. Codes, Crim. Prac. §§ 295–96 (1948); *Barrett* v. *Commonwealth,* 202 Ky. 153, 259 S. W. 25; *Stucker* v. *Commonwealth,* 261 Ky. 618, 88 S. W. 2d 280; *Murrell* v. *Commonwealth,* 291 Ky. 65, 163 S. W. 2d 1.

(20) Mo. Rev. Stat. Ann. §§ 4192–94 (1939).

(21) Mont. Rev. Codes Ann. §§ 94–8009 to 94–8012 (1947).

(22) Nev. Comp. Laws Ann. §§ 11192.01 to 11192.06 (Supp. 1945).

(23) N. M. Stat. Ann. §§ 42–1404 to 42–1407 (1941).

(24) Ohio Gen. Code Ann. §§ 13456–8, 13456–9 (1939).

(25) Okla. Stat. Ann. tit. 22, §§ 1005–08 (1937). See *Bingham* v. *State,* 82 Okla. Crim. 305, 169 P. 2d 311.

(26) Pa. Stat. Ann. tit. 50, § 48 (Supp. 1948). See *Commonwealth* v. *Barnes,* 280 Pa. 351, 124 A. 636 (whether statute applies after conviction and sentence or whether common law principles govern is not clear). But cf. *Ex parte McGinnis,* 14 W. N. C. 221 (Pa. Sup. Ct.).

(27) Tex. Stat., Code Crim. Proc. arts. 921–27 (1948). See *Dotson* v. *State,* 149 Tex. Crim. 434, 195 S. W. 2d 372. A hearing may also be initiated on the affidavits of two private physicians. Cf. *Ex parte Millikin,* 108 Tex. Crim. 121, 299 S. W. 433; *Millikin* v. *Jeffrey,* 117 Tex. 134, 299 S. W. 393 (similar earlier statute).

(28) Utah Code Ann. §§ 105–37–9 to 105–37–12 (1943). See *State ex rel. Johnson* v. *Alexander,* 87 Utah 376, 49 P. 2d 408; *State* v. *Green,* 88 Utah 491, 55 P. 2d 1324.

(29) Wyo. Comp. Stat. Ann. §§ 10–1701, 10–1702 (1945).

III. Official's refusal to initiate given explicit finality without review:

None.

D. States suspending execution of death penalty under statutory provisions for inquiry by Governor or by a body of physicians and laymen on initiation by designated prison or police official:

I. Proceeding appears to afford opportunity to be heard:

(30) Iowa Code §§ 792.5 to 792.7 (1946).

II. Proceeding appears to be *ex parte:*

(31) Conn. Gen. Stat. § 8817 (1949).

(32) Kan. Gen. Stat. Ann. § 62–2406 (1935).

(33) Neb. Rev. Stat. § 29–2509 (1943). See *In re Grammer,* 104 Neb. 744, 178 N. W. 624.

III. Whether proceeding is *ex parte* or affords opportunity to be heard is uncertain:

(34) Ariz. Code Ann. §§ 44–2307, 44–2309 (1939).

(35) Fla. Stat. § 922.07 (1941).

(36) Miss. Code Ann. § 2558 (1942).

E. States in which suspension of execution of death penalty because of insanity is at discretion of Governor:

(37) Ga. Code Ann. §§ 27–2601, 27–2602 (1936), *Solesbee* v. *Balkcom,* 205 Ga. 122, 52 S. E. 2d 433.

(38) Indiana. *Diamond* v. *State,* 195 Ind. 285, 144 N. E. 466 (only remedy is reprieve by Governor).

(39) Mass. Gen. Laws c. 279, § 48 (1932), *Juggins* v. *Executive Council,* 257 Mass. 386, 154 N. E. 72 (only remedy seems to be reprieve by Governor with advice and consent of Executive Council).

F. States as to which legislation or judicial decisions afford no clear basis for classification:

(40) Delaware. Compare Del. Rev. Code § 3083 (1935) (insanity after conviction but before sentence in capital cases); *id.* § 3084 (insanity while serving imprisonment sentence).

(41) Maryland. Compare Md. Ann. Code Gen. Laws art. 27, § 798; art. 59, § 47 (1939) (insanity while serving imprisonment sentence).

(42) New Hampshire.

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(43) N. Y. Crim. Code § 495a. Compare 2 Rep. Atty. Gen. N. Y. 294, 297 (1914), with *People* v. *Skwirsky,* 213 N. Y. 151, 153–54, 107 N. E. 47–48.

(44) Oregon. Compare Ore. Comp. Laws Ann. §§ 26–930, 26–931 (1940) (insanity at trial).

(45) South Dakota. Compare S. D. Code § 34.2001 (1939) (a person cannot "be tried, adjudged to punishment, or punished for a public offense while he is insane"); *id.* §§ 34.2002 to 34.2004 (insanity after conviction but before sentence).

(46) Vermont.

(47) Virginia. Compare Va. Code Ann. §§ 19–208, 37–93 (1950) (insanity after conviction but before sentence); *id.* § 19–209 (insanity while serving imprisonment sentence).

(48) West Virginia. Compare W. Va. Code Ann. § 6198 (1949) (insanity after conviction or while serving sentence).

WONG YANG SUNG *v.* McGRATH, ATTORNEY GENERAL, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 154. Argued December 6, 1949.—Decided February 20, 1950.

1. Administrative hearings in proceedings for the deportation of aliens must conform to the requirements of the Administrative Procedure Act, 5 U. S. C. §§ 1001 *et seq.* Pp. 35–53.
2. The history of this Act discloses that it is remedial legislation which should be construed, so far as its text permits, to give effect to its remedial purposes where the evils it was aimed at appear. Pp. 36–41.
3. One of the fundamental purposes of the Act was to ameliorate the evils resulting from the practice of commingling in one person the duties of prosecutor and judge. Pp. 41–45, 46.
4. A hearing in a proceeding for the deportation of an alien was presided over by a "presiding inspector" of the Immigration Service, who had not investigated that particular case but whose general duties included the investigation of similar cases. There being no "examining inspector" present to conduct the prosecution, it was the duty of the "presiding inspector" to conduct the interrogation of the alien and the Government's witnesses, cross-examine the alien's witnesses, and "present such evidence as is necessary to support the charges in the warrant of arrest." It might become his duty to lodge an additional charge against the alien and hear the evidence on that charge. After the hearing, he was required to prepare a summary of the evidence, proposed findings of fact, conclusions of law, and a proposed order, for the consideration of the Commissioner of Immigration. *Held:* This was contrary to the purpose of the Administrative Procedure Act to ameliorate the evils resulting from a combination of the prosecuting and adjudicating functions in administrative proceedings. Pp. 45–48.
5. Section 5 of the Administrative Procedure Act, which establishes certain formal requirements for every "adjudication required by statute to be determined on the record after opportunity for agency hearing," applies to deportation proceedings conducted by the Im-

migration Service, although the Immigration Act contains no express requirement for hearings in deportation proceedings. Pp. 48–51.

(a) The limitation of § 5 of the Administrative Procedure Act to hearings "required by statute" does not exempt hearings held by compulsion but only those which administrative agencies may hold by regulation, rule, custom, or special dispensation. P. 50.

(b) They do not exempt hearings the requirement for which has been read into a statute by this Court in order to save the statute from constitutional invalidity. Pp. 50–51.

6. The exception in § 7 (a) of the Administrative Procedure Act of proceedings before "officers specially provided for by or designated pursuant to statute" does not exempt deportation hearings held before immigrant inspectors. Pp. 51–53.

(a) Nothing in the Immigration Act specifically provides that immigrant inspectors shall conduct deportation hearings or be designated to do so. Pp. 51–52.

84 U. S. App. D. C. 419, 174 F. 2d 158, reversed.

In a habeas corpus proceeding, the District Court held that the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. §§ 1001 *et seq.*, does not apply to deportation hearings. 80 F. Supp. 235. The Court of Appeals affirmed. 84 U. S. App. D. C. 419, 174 F. 2d 158. This Court granted certiorari. 338 U. S. 812. *Reversed,* p. 53.

Irving Jaffe argued the cause for petitioner. With him on the brief were *Jack Wasserman, Gaspare Cusumano* and *Thomas A. Farrell.*

Robert W. Ginnane argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl, L. Paul Winings* and *Charles Gordon.*

Wendell Berge, A. Alvis Layne, Jr. and *John B. Gage* filed a brief for Riss & Co., Inc., as *amicus curiae,* supporting petitioner.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This *habeas corpus* proceeding involves a single ultimate question—whether administrative hearings in deportation cases must conform to requirements of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. §§ 1001 *et seq.*

Wong Yang Sung, native and citizen of China, was arrested by immigration officials on a charge of being unlawfully in the United States through having overstayed shore leave as one of a shipping crew. A hearing was held before an immigrant inspector who recommended deportation. The Acting Commissioner approved; and the Board of Immigration Appeals affirmed.

Wong Yang Sung then sought release from custody by *habeas corpus* proceedings in District Court for the District of Columbia, upon the sole ground that the administrative hearing was not conducted in conformity with §§ 5 and 11 of the Administrative Procedure Act.[1]

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[1] Particularly invoked are § 5 (c), 60 Stat. 237, 240, 5 U. S. C. § 1004 (c), which provides in part:

"The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. . . ."; and § 11, 60 Stat. at 244, 5 U. S. C. § 1010, which provides in part: "Subject to the civil-service

The Government admitted noncompliance, but asserted that the Act did not apply. The court, after hearing, discharged the writ and remanded the prisoner to custody, holding the Administrative Procedure Act inapplicable to deportation hearings. 80 F. Supp. 235. The Court of Appeals affirmed. 84 U. S. App. D. C. 419, 174 F. 2d 158. Prisoner's petition for certiorari was not opposed by the Government and, because the question presented has obvious importance in the administration of the immigration laws, we granted review. 338 U. S. 812.

I.

The Administrative Procedure Act of June 11, 1946, *supra,* is a new, basic and comprehensive regulation of procedures in many agencies, more than a few of which can advance arguments that its generalities should not or do not include them. Determination of questions of its coverage may well be approached through consideration of its purposes as disclosed by its background.

Multiplication of federal administrative agencies and expansion of their functions to include adjudications

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and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. . . ."

which have serious impact on private rights has been one of the dramatic legal developments of the past half-century.[2] Partly from restriction by statute, partly from judicial self-restraint, and partly by necessity—from the nature of their multitudinous and semilegislative or executive tasks—the decisions of administrative tribunals were accorded considerable finality, and especially with respect to fact finding.[3] The conviction developed, particularly within the legal profession, that this power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use.[4]

Concern over administrative impartiality and response to growing discontent was reflected in Congress as early as 1929, when Senator Norris introduced a bill to create

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[2] See *e. g.,* Blachly and Oatman, Administrative Legislation and Adjudication 1 (1934); Landis, The Administrative Process 1 (1938); Pound, Administrative Law 27 (1942); Carrow, The Background of Administrative Law 1 (1948); The Federal Administrative Procedure Act and the Administrative Agencies 4 (N. Y. U. 1947); Final Report of Attorney General's Committee on Administrative Procedure 7 (1941), contained in S. Doc. No. 8, 77th Cong., 1st Sess. (1941); Cushman, The Independent Regulatory Commissions, cc. II–V (1941); Frankfurter, The Task of Administrative Law, 75 U. of Pa. L. Rev. 614 (1927); materials cited in n. 4, *infra.*

[3] See *e. g.,* Dickinson, Administrative Justice and the Supremacy of Law, *passim* (1927); Final Report of Attorney General's Committee on Administrative Procedure, *supra,* at 11–18, 75–92; and see materials cited in n. 4, *infra.*

[4] *E. g.,* Root, Public Service by the Bar, 41 A. B. A. Rep. 355, 368 (1916); Hughes, Some Aspects of the Development of American Law, 39 N. Y. B. A. Rep. 266, 269 (1916); Sutherland, Private Rights and Government Control, 42 A. B. A. Rep. 197, 205 (1917); Address of President Guthrie, 46 N. Y. B. A. Rep. 169, 186 (1923). After 1933, when the American Bar Association formed a Special Committee on Administrative Law, the Bar's concern can be traced in this Committee's reports. *E. g.,* 58 A. B. A. Rep. 197, 407 (1933); 59 A. B. A. Rep. 539 (1934); 61 A. B. A. Rep. 720 (1936); 62 A. B. A. Rep. 789 (1937).

a separate administrative court.[5] Fears and dissatisfactions increased as tribunals grew in number and jurisdiction, and a succession of bills offering various remedies appeared in Congress.[6] Inquiries into the practices of state agencies, which tended to parallel or follow the federal pattern, were instituted in several states, and some studies noteworthy for thoroughness, impartiality and vision resulted.[7]

The Executive Branch of the Federal Government also became concerned as to whether the structure and procedure of these bodies was conducive to fairness in the administrative process. President Roosevelt's Committee on Administrative Management in 1937 recommended complete separation of adjudicating functions and personnel from those having to do with investigation or prosecution.[8] The President early in 1939 also directed the Attorney General to name "a committee of eminent lawyers, jurists, scholars, and administrators to review the entire administrative process in the various

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[5] S. 5154, 70th Cong., 2d Sess. (1929).

[6] S. 1835, 73d Cong., 1st Sess. (1933); S. 3787, H. R. 12297, 74th Cong., 2d Sess. (1936); S. 3676, 75th Cong., 3d Sess. (1938); H. R. 6324, H. R. 4235, H. R. 4236, S. 915, S. 916, 76th Cong., 1st Sess. (1939); S. 674, S. 675, S. 918, H. R. 3464, H. R. 4238, H. R. 4782, 77th Cong., 1st Sess. (1941); H. R. 4314, H. R. 5081, H. R. 5237, S. 2030, 78th Cong., 2d Sess. (1944); H. R. 1203, S. 7, 79th Cong., 1st Sess. (1945).

[7] *E. g.*, Benjamin, Administrative Adjudication in the State of New York (1942); Tenth Biennial Report of the Judicial Council to the Governor and Legislature of California (1944). See also Fesler, The Independence of State Regulatory Agencies (1942); Handbook of the National Conference of Commissioners on Uniform State Laws, 226 *et seq.* (1943); 63 A. B. A. Rep. 623 (1938).

[8] Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management 37 (1937).

departments of the executive Government and to recommend improvements, including the suggestion of any needed legislation." [9]

So strong was the demand for reform, however, that Congress did not await the Committee's report but passed what was known as the Walter-Logan bill, a comprehensive and rigid prescription of standardized procedures for administrative agencies.[10] This bill was vetoed by President Roosevelt December 18, 1940,[11] and the veto was sustained by the House.[12] But the President's veto message made no denial of the need for reform. Rather it pointed out that the task of the Committee, whose objective was "to suggest improvements to make the process more workable and more just," had proved "unexpectedly complex." The President said, "I should desire to await their report and recommendations before approving any measure in this complicated field." [13]

The committee divided in its views and both the majority and the minority submitted bills [14] which were introduced in 1941. A subcommittee of the Senate Judiciary Committee held exhaustive hearings on three proposed

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[9] The quoted statement is from President Roosevelt's message to Congress of December 18, 1940, vetoing H. R. 6324, the so-called Walter-Logan bill. H. R. Doc. No. 986, 76th Cong., 3d Sess., 3–4 (1940). The origin and orders leading to the creation of the Attorney General's Committee are set out in Appendix A of the Committee's Final Report, *supra.*

[10] S. 915, H. R. 6324, 76th Cong., 1st Sess. (1939).

[11] 86 Cong. Rec. 13942–3 (1940), reprinted in H. R. Doc. No. 986, 76th Cong., 3d Sess. (1940).

[12] 86 Cong. Rec. 13953 (1940).

[13] 86 Cong. Rec. at 13943; H. R. Doc. No. 986, *supra,* 4.

[14] These bills appear at pp. 192 and 217 of the Committee's Final Report, *supra.* The majority bill became S. 675, 77th Cong., 1st Sess. (1941) and the minority recommendation was embodied in S. 674, 77th Cong., 1st Sess. (1941).

measures,[15] but, before the gathering storm of national emergency and war, consideration of the problem was put aside. Though bills on the subject reappeared in 1944,[16] they did not attract much attention.

The McCarran-Sumners bill, which evolved into the present Act, was introduced in 1945.[17] Its consideration and hearing, especially of agency interests, was painstaking. All administrative agencies were invited to submit their views in writing. A tentative revised bill was then prepared and interested parties again were invited to submit criticisms.[18] The Attorney General named representatives of the Department of Justice to canvass the agencies and report their criticisms, and submitted a favorable report on the bill as finally revised.[19] It passed both Houses without opposition and was signed by President Truman June 11, 1946.[20]

The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some am-

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[15] The hearings ran from April 2 to July 2, 1941, and, with an appendix, have been collected in four parts and over 1,600 pages. Hearings before Subcommittee of the Committee on the Judiciary on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess. (1941).

[16] H. R. 4314, H. R. 5081, H. R. 5237, S. 2030, 78th Cong., 2d Sess. (1944).

[17] S. 7 and H. R. 1203, 79th Cong., 1st Sess. (1945).

[18] See H. R. Rep. No. 1980, 79th Cong., 2d Sess. 14–15 (1946); S. Rep. No. 752, 79th Cong., 1st Sess. 4–5 (1945), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., at 233, 248–249, and 185, 190–191, respectively.

[19] S. Rep. No. 752, 79th Cong., 1st Sess. 37–45 (1945); 92 Cong. Rec. App. A–2982–5 (1946).

[20] 92 Cong. Rec. 2167 (1946) (passage by the Senate); 92 Cong. Rec. 5668 (1946) (amended version passed by House); 92 Cong. Rec. 5791 (1946) (House version agreed to by Senate); 92 Cong. Rec. 6706 (1946) (approved by the President).

biguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.

II.

Of the several administrative evils sought to be cured or minimized, only two are particularly relevant to issues before us today. One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other.[21] We pursue this no further than to note that any exception we may find to its applicability would tend to defeat this purpose.

More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge. The President's Committee on Administrative Management voiced in 1937 the theme which, with variations in language, was reiterated throughout the legislative history of the Act. The Committee's report, which President Roosevelt transmitted to Congress with his approval as "a great document of permanent importance," [22] said:

> ". . . the independent commission is obliged to carry on judicial functions under conditions which

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[21] H. R. Rep. No. 1980, 79th Cong., 2d Sess. 16 (1946); Final Report of the Attorney General's Committee on Administrative Procedure, 20 (1941); McFarland, Analysis of the Federal Administrative Procedure Act, in Federal Administrative Procedure Act and the Administrative Agencies 16, 22 (N. Y. U. 1947). See also Hearings before Subcommittee No. 4 of the House Committee on the Judiciary on H. R. 4236, H. R. 6198, and H. R. 6324, 76th Cong., 1st Sess. 14, 31 (1939); S. Rep. No. 442, 76th Cong., 1st Sess. 9 (1939); H. R. Rep. No. 1149, 76th Cong., 1st Sess. 2–3 (1939); S. Doc. No. 71, 76th Cong., 1st Sess. 5 (1939).

[22] 81 Cong. Rec. 187, 191 (1937).

threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible.

"Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself." Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management, 36–37 (1937).

The Committee therefore recommended a redistribution of functions within the regulatory agencies. "[I]t would be divided into an administrative section and a judicial section" and the administrative section "would formulate rules, initiate action, investigate complaints . . ." and the judicial section "would sit as an impartial, independent body to make decisions affecting the public interest and private rights upon the basis of the records and findings presented to it by the administrative section." *Id.* at 37.

Another study was made by a distinguished committee named by the Secretary of Labor, whose jurisdiction at the time included the Immigration and Naturalization Service. Some of the committee's observations have relevancy to the procedure under examination here. It said:

"The inspector who presides over the formal hearing is in many respects comparable to a trial judge. He has, at a minimum, the function of determining—subject to objection on the alien's behalf—what goes into the written record upon which decision ultimately is to be based. Under the existing practice he has also the function of counsel representing the moving party—he does not merely admit evidence against the alien; he has the responsibility of seeing that such evidence is put into the record. The precise scope of his appropriate functions is the first question to be considered." The Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service, 77 (Mimeo. 1940).

Further:

"Merely to provide that in particular cases different inspectors shall investigate and hear is an insufficient guarantee of insulation and independence of the presiding official. The present organization of the field staff not only gives work of both kinds commonly to the same inspector but tends toward an identity of viewpoint as between inspectors who are chiefly doing only one or the other kind of work. . . .

". . . We recommend that the presiding inspectors be relieved of their present duties of presenting the case against aliens and be confirmed [*sic*] entirely to the duties customary for a judge. This, of course, would require the assignment of another officer to perform the task of a prosecuting attorney. The appropriate officer for this purpose would seem to be the investigating inspector who, having prepared the case against the alien, is already thoroughly familiar with it. . . .

> "A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible. Nor is complete divorce between investigation and hearing possible so long as the presiding inspector has the duty himself of assembling and presenting the results of the investigation. . . ." *Id.* at 81–82.

And the Attorney General's Committee on Administrative Procedure, which divided as to the appropriate remedy,[23] was unanimous that this evil existed. Its Final Report said:

> "These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable. But they are also avoidable and should be avoided by appropriate internal division of labor. For the disqualifications produced by investigation or advocacy are personal psychological ones which result from engaging in those types of activity; and the problem is simply one of isolating those who engage in the activity. Creation of independent hearing commissioners insulated from all phases of a case other than hearing and deciding will, the Committee believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation. . . ." Rep. Atty. Gen. Comm. Ad. Proc. 56 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 56 (1941).

The Act before us adopts in general this recommended form of remedial action. A minority of the Committee had, furthermore, urged an even more thoroughgoing

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[23] See n. 14, *supra*.

separation and supported it with a cogent report. *Id.* at 203 *et seq.*

Such were the evils found by disinterested and competent students. Such were the facts before Congress which gave impetus to the demand for the reform which this Act was intended to accomplish. It is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns.

III.

Turning now to the case before us, we find the administrative hearing a perfect exemplification of the practices so unanimously condemned.

This hearing, which followed the uniform practice of the Immigration Service,[24] was before an immigrant inspector, who, for purposes of the hearing, is called the "presiding inspector." Except with consent of the alien, the presiding inspector may not be the one who investigated the case. 8 C. F. R. 150.6 (b).[25] But the inspector's duties include investigation of like cases; and while he is today hearing cases investigated by a colleague, tomorrow his investigation of a case may be heard before the inspector whose case he passes on today. An "examining inspector" may be designated to conduct the prosecution, 8 C. F. R. 150.6 (n), but none was in this case; and, in any event, the examining inspector also has the same mixed prosecutive and hearing functions. The presiding

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[24] See 8 C. F. R. 150.1 *et seq.*

[25] The initial step in a deportation case is the investigation of an alien by an immigrant inspector. 8 C. F. R. 150.1. This is followed by issuance of a warrant of arrest, 8 C. F. R. 150.2–150.4, and incarceration, unless the alien is released under bond. 8 C. F. R. 150.5. The formal hearing follows.

inspector, when no examining inspector is present, is required to "conduct the interrogation of the alien and the witnesses in behalf of the Government and shall cross-examine the alien's witnesses and present such evidence as is necessary to support the charges in the warrant of arrest." 8 C. F. R. 150.6 (b). It may even become his duty to lodge an additional charge against the alien and proceed to hear his own accusation in like manner. 8 C. F. R. 150.6 (l). Then, as soon as practicable, he is to prepare a summary of the evidence, proposed findings of fact, conclusions of law, and a proposed order. A copy is furnished the alien or his counsel, who may file exceptions and brief, 8 C. F. R. 150.7, whereupon the whole is forwarded to the Commissioner. 8 C. F. R. 150.9.

The Administrative Procedure Act did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions. But that the safeguards it did set up were intended to ameliorate the evils from the commingling of functions as exemplified here is beyond doubt. And this commingling, if objectionable anywhere, would seem to be particularly so in the deportation proceeding, where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused. Nothing in the nature of the parties or proceedings suggests that we should strain to exempt deportation proceedings from reforms in administrative procedure applicable generally to federal agencies.

Nor can we accord any weight to the argument that to apply the Act to such hearings will cause inconvenience and added expense to the Immigration Service. Of course it will, as it will to nearly every agency to which it is applied. But the power of the purse belongs to Congress, and Congress has determined that the price

for greater fairness is not too high. The agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter.

This brings us to contentions both parties have advanced based on the pendency in Congress of bills to exempt this agency from the Act. Following an adverse decision,[26] the Department asked Congress for exempting legislation,[27] which appropriate committees of both Houses reported favorably but in different form and substance.[28] Congress adjourned without further action. The Government argues that Congress knows that the Immigration Service has construed the Act as not applying to deportation proceedings, and that it "has taken no action indicating disagreement with that interpretation"; that therefore it "is at least arguable that Congress was prepared to specifically confirm the administrative construction by clarifying legislation." We do not think we can draw that inference from incompleted steps in the legislative process. *Cf. Helvering* v. *Hallock,* 309 U. S. 106, 119–120.

On the other hand, we will not draw the inference, urged by petitioner, that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations. We do not feel justified in holding that a request for and failure to get in a single session of Congress clarifying legislation on a genuinely debatable point of agency procedure admits weakness in the agency's contentions. We draw, therefore, no inference in favor of either construction of the Act—from the

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[26] *Eisler* v. *Clark* (D. D. C. 1948), 77 F. Supp. 610.

[27] S. 2755 and H. R. 6652, 80th Cong., 2d Sess. (1948).

[28] S. Rep. No. 1588, H. R. Rep. No. 2140, 80th Cong., 2d Sess. (1948).

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Department's request for legislative clarification, from the congressional committees' willingness to consider it, or from Congress' failure to enact it.

We come, then, to examination of the text of the Act to determine whether the Government is right in its contentions: first, that the general scope of § 5 of the Act does not cover deportation proceedings; and, second, that even if it does, the proceedings are excluded from the requirements of the Act by virtue of § 7.

IV.

The Administrative Procedure Act, § 5, establishes a number of formal requirements to be applicable "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." The argument here depends upon the words "adjudication required by statute." The Government contends that there is no express requirement for any hearing or adjudication in the statute authorizing deportation,[29] and that this omission shields these proceedings from the impact of § 5. Petitioner, on the other hand, contends that deportation hearings, though not expressly required by statute, are required under the decisions of this Court,[30]

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[29] Section 19 (a) of the Immigration Act of February 5, 1917, 39 Stat. 874, 889, as amended, 8 U. S. C. § 155 (a), provides in part:

". . . any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . . In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final." See Note 33, *infra*.

[30] *The Japanese Immigrant Case*, 189 U. S. 86, 100, 101; *Kwock Jan Fat* v. *White*, 253 U. S. 454, 459, 464; *Bridges* v. *Wixon*, 326 U. S. 135, 160 (concurring opinion).

and the proceedings, therefore, are within the scope of § 5.

Both parties invoke many citations to legislative history as to the meaning given to these key words by the framers, advocates or opponents of the Administrative Procedure Act. Because § 5 in the original bill applied to hearings required "by law," [31] because it was suggested by the Attorney General that it should be changed to "required by statute or Constitution," [32] and because it finally emerged "required by statute," the Government argues that the section is intended to apply only when explicit statutory words granting a right to adjudication can be pointed out. Petitioner on the other hand cites references which would indicate that the limitation to statutory hearing was merely to avoid creating by inference a new right to hearings where no right existed otherwise. We do not know. The legislative history is more conflicting than the text is ambiguous.

But the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body. It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and

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[31] Section 301 of the bills proposed in the majority and minority recommendations of the Final Report of the Attorney General's Committee on Administrative Procedure, pp. 195, 232–233.

[32] Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess. 1456 (1941).

who had been here some time even if illegally. The Court said:

> "This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." *The Japanese Immigrant Case,* 189 U. S. 86, 101.

We think that the limitation to hearings "required by statute" in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.

Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceed-

ings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.

We hold that the Administrative Procedure Act, § 5, does cover deportation proceedings conducted by the Immigration Service.

V.

The remaining question is whether the exception of § 7 (a) of the Administrative Procedure Act exempts deportation hearings held before immigrant inspectors. It provides:

> "SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> "(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. . . ." 60 Stat. 237, 241, 5 U. S. C. § 1006.

The Government argues that immigrant inspectors are "specially provided for by or designated pursuant to" § 16 of the Immigration Act, which, in pertinent part, reads:

> ". . . The inspection . . . of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this Act,[33] shall be conducted by

[33] The original Act, 39 Stat. 886, reads "under this Act," although in the codification, 8 U. S. C. § 152, it reads "under this section." The former is controlling. 1 U. S. C. (Supp. II, 1949) §§ 112, 204 (a).

> immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. . . . Said inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; . . ." 39 Stat. 874, 885, as amended, 8 U. S. C. § 152.

Certainly nothing here specifically provides that immigrant inspectors shall conduct deportation hearings or be designated to do so. This language does direct them to conduct border inspections of aliens seeking admission. They may administer oaths and take, record, and consider evidence. But these functions are indispensable to investigations which are concededly within their competence. And these functions are likewise necessary to enable the preparation of complaints for prosecutive purposes. But that Congress by grant of these powers has specially constituted them or provided for their designation as hearing officers in deportation proceedings does not appear.

Section 7 (a) qualifies as presiding officers at hearings the agency and one or more of the members of the body comprising the agency, and it also leaves untouched any others whose responsibilities and duties as hearing officers are established by other statutory provision. But if hearings are to be had before employees whose responsibility and authority derives from a lesser source, they must be examiners whose independence and tenure are so guarded by the Act as to give the assurances of neutrality which Congress thought would guarantee the impartiality of the administrative process.

We find no basis in the purposes, history or text of this Act for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards

enacted for general application to administrative agencies. We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity. Since the proceeding in the case before us did not comply with these requirements, we sustain the writ of *habeas corpus* and direct release of the prisoner.*

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE REED, dissenting.

The Court, it seems to me, has disregarded a congressional exemption of certain agencies, including the Immigration and Naturalization Service, from some of the requirements of the Administrative Procedure Act. Such judicial intrusion into the legislative domain justifies a protest. It may be useful to call attention to the necessity of recognizing specific exceptions to general rules. This protest is rested on the ground that immigrant inspectors performing duties under § 16 of the Immigration Act are within the exception provided by § 7 (a) of the Administrative Procedure Act. The Court's opinion discusses this point under subdivision V. The sections are there set out and can be examined by the reader.

In this case no one questions the constitutionality of the hearing Wong received before the immigrant inspector, with administrative review by the Commissioner and the Board of Immigration Appeals. The question on which I disagree with the Court is whether the Administrative Procedure Act permits an inspector of the Immigration and Naturalization Service to serve as a presiding officer at a deportation hearing.

*[For order modifying the judgment, see *post*, p. 908.]

Section 7 (a) of the Administrative Procedure Act provides that the official presiding at the taking of evidence shall be an agency, an agency member or an examiner appointed under that Act. There is an exception to this requirement. It reads as follows:

> "but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

It is this exception that made it proper for an immigrant inspector to preside at this deportation hearing.

Under § 16 of the Immigration Act, 39 Stat. 874, 885, the

> "inspection . . . of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this Act, shall be conducted by immigrant inspectors, ... Said inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; . . . ."

It seems to me obvious that the exception provided in § 7 (a) covers immigrant inspectors dealing with the arrest of an alien for violation of the Immigration Act. The examination of arrested aliens at a deportation proceeding is surely a specified class of proceedings under § 7 (a) of the Administrative Procedure Act, and it is surely conducted by an officer "specially provided for by . . . statute."

The reason for the exception in § 7 (a) was not spelled out in the legislative history or in the Act itself. The

exception may have been made to retain smoothness of operation in the several agencies where there were officials specially provided for by statute or designated pursuant to a statute. When making exceptions from the requirements as to separation of the investigatory and adjudicatory functions, it was natural to include officers specially designated by statute to sit in judgment. Agency members are excluded from these requirements of the Administrative Procedure Act. They, too, have investigatory and adjudicatory duties. Since the members of the agency and the statutorily designated officers were specially selected for the functions they were to perform, Congress probably reposed confidence in their experience and expertness. It doubtless did not wish to disorganize administration until time showed whether that confidence was well placed.[1]

Since the Court does not accept my view of the reach of § 7 (a), it would be useless to undertake an analysis of the other questions presented by the petition for certiorari.

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[1] Thus the congressional committee warned that should the exception "be a loophole for avoidance of the examiner system in any real sense, corrective legislation would be necessary. That provision is not intended to permit agencies to avoid the use of examiners but to preserve special statutory types of hearing officers who contribute something more than examiners could contribute and at the same time assure the parties fair and impartial procedure." S. Doc. No. 248, 79th Cong., 2d Sess., p. 216.

UNITED STATES *v.* RABINOWITZ.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 293. Argued January 11, 1950.—Decided February 20, 1950.

1. Knowing that respondent had sold four forged postage stamps to a government agent and probably possessed many more in his one-room place of business which was open to the public, officers obtained a warrant for his arrest; but they did not obtain a search warrant. They arrested him in his place of business, searched the desk, safe and file cabinets and seized 573 forged stamps. He was indicted for possessing and concealing the stamps so seized and for selling the four that had been purchased. The seized stamps were admitted in evidence over his objection, and he was convicted on both counts. *Held:* The search and seizure were incident to a lawful arrest, they were not unreasonable, and they did not violate the Fourth Amendment. Pp. 57–66.

   (a) What is a reasonable search is not to be determined by any fixed formula. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. P. 63.

   (b) Here the search and seizure were reasonable because: (1) they were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; and (5) the possession of the forged stamps was a crime. Pp. 63–64.

2. *Trupiano* v. *United States*, 334 U. S. 699, overruled to the extent that it requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest. Pp. 65–66.

176 F. 2d 732, reversed.

Respondent was convicted of violating 18 U. S. C. (1946 ed.) §§ 265, 268. The Court of Appeals reversed. 176 F. 2d 732. This Court granted certiorari. 338 U. S. 884. *Reversed*, p. 66.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Campbell, Robert S. Erdahl* and *Harold D. Cohen.*

Abraham Lillienthal argued the cause and filed a brief for respondent.

MR. JUSTICE MINTON delivered the opinion of the Court.

Respondent was convicted of selling and of possessing and concealing forged and altered obligations of the United States with intent to defraud. The question presented here is the reasonableness of a search without a search warrant of a place of business consisting of a one-room office, incident to a valid arrest.

On February 1, 1943, a printer who possessed plates for forging "overprints" on canceled stamps was taken into custody. He disclosed that respondent, a dealer in stamps, was one of the customers to whom he had delivered large numbers of stamps bearing forged overprints.[1] On Saturday, February 6, 1943, with this information concerning respondent and his activities in the hands of Government officers, a postal employee was sent to respondent's place of business to buy stamps bearing overprints. He bought four stamps. On Monday, February 8, the stamps were sent to an expert to determine whether the overprints were genuine. On February 9 the report was received showing the overprints to be forgeries, having been placed upon the stamps after cancellation, and not before as was the Government's practice. On February 11 a further statement was obtained

[1] The stamps involved were genuine postage stamps. At certain times the Government has printed the name of a particular state or possession on stamps prior to post office sale. Canceled stamps bearing these overprints have an unusual value for stamp collectors.

from the printer who had made the overprints. On February 16, 1943, a warrant for the arrest of respondent was obtained.

In 1941 respondent had been convicted and sentenced to three months' imprisonment on a plea of guilty to a two-count indictment charging the alteration of obligations of the United States, that is, of overprinting Government postage stamps, and the possession of a plate from which a similitude of a United States obligation had been printed. Thus, when the warrant for arrest was obtained, the officers had reliable information that respondent was an old offender, that he had sold four forged and altered stamps to an agent of the Government, and that he probably possessed several thousand altered stamps bearing forged overprints. While the warrant of arrest was not put in evidence it contained, as a Government witness testified on cross-examination, authority to arrest for more than the sale of the four stamps; it covered all the Government officers' information.[2]

Armed with this valid warrant for arrest, the Government officers, accompanied by two stamp experts, went to respondent's place of business, a one-room office open to the public. The officers thereupon arrested the re-

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[2] "Q. Now, when you went to Mr. Rabinowitz's place of business, all you had with you was a warrant to arrest him in connection with the alleged sale of those four stamps; is that correct?

"A. And all information contained in the arrest warrant; yes.

"Q. I didn't hear the last part of your answer.

"A. In our questions a few minutes back, I stated that the four stamps were specifically mentioned in the application for the warrant for arrest, but that there was other information in my possession that was included in that warrant for arrest.

"Q. Well, wasn't the warrant of arrest issued solely on the charge that Mr. Rabinowitz had sold four stamps containing false or altered overprints? Wasn't that what the warrant of arrest was issued for?

"A. Primarily, yes, but not completely."

spondent, and over his objection searched the desk, safe, and file cabinets in the office for about an hour and a half. They found and seized 573 stamps, on which it was later determined that overprints had been forged, along with some other stamps which were subsequently returned to respondent.

Respondent was indicted on two counts. He was charged in count one with selling four forged and altered stamps, knowing they were forged and altered and with the intent that they be passed as genuine.[3] The second count charged that he did keep in his possession and conceal, with intent to defraud, the 573 forged and altered stamps.[4]

Respondent made timely motions for suppression and to strike the evidence pertaining to the 573 stamps, all of which were eventually denied. Respondent was convicted on both counts after trial before a jury in which he offered no evidence. Relying on *Trupiano* v. *United States,* 334 U. S. 699, the Court of Appeals, one judge dissenting, reversed on the ground that since the officers had had time in which to procure a search warrant and had failed to do so the search was illegal, and the evidence therefore should have been excluded. 176 F. 2d 732. We granted certiorari to determine the validity of the search because of the question's importance in the administration of the law of search and seizure. 338 U. S. 884.

Were the 573 stamps, the fruits of this search, admissible in evidence? If legally obtained, these stamps were competent evidence to show intent under the first count of the indictment, and they were the very things the possession of which was the crime charged in the second count.

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[3] 18 U. S. C. (1946 ed.) § 268.

[4] 18 U. S. C. (1946 ed.) § 265. All of these stamps are defined by statute as obligations of the United States. 18 U. S. C. (1946 ed.) § 261.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is unreasonable searches that are prohibited by the Fourth Amendment. *Carroll* v. *United States,* 267 U. S. 132, 147. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required. The right of the "people to be secure in their persons" was certainly of as much concern to the framers of the Constitution as the property of the person. Yet no one questions the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. *Weeks* v. *United States,* 232 U. S. 383, 392. Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him.

Of course, a search without warrant incident to an arrest is dependent initially on a valid arrest. Here the officers had a warrant for respondent's arrest which was, as far as can be ascertained, broad enough to cover the crime of possession charged in the second count, and consequently respondent was properly arrested. Even if the warrant of arrest were not sufficient to authorize the arrest for possession of the stamps, the arrest therefor was valid because the officers had probable cause to believe that a felony was being committed in their very presence. *Carroll* v. *United States,* 267 U. S. 132, 156–57.

The arrest was therefore valid in any event, and respondent's person could be lawfully searched. Could the

officers search his desk, safe and file cabinets, all within plain sight of the parties, and all located under respondent's immediate control in his one-room office open to the public?

Decisions of this Court have often recognized that there is a permissible area of search beyond the person proper. Thus in *Agnello* v. *United States,* 269 U. S. 20, 30, this Court stated:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

The right "to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed" seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest. *Weeks* v. *United States,* 232 U. S. 383, 392. It became accepted that the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search was not "unreasonable." *Agnello* v. *United States,* 269 U. S. 20, 30; *Carroll* v. *United States,* 267 U. S. 132, 158; *Boyd* v. *United States,* 116 U. S. 616, 623–24.

In *Marron* v. *United States,* 275 U. S. 192, the officers had a warrant to search for liquor, but the warrant did not describe a certain ledger and invoices pertaining to the operation of the business. The latter were seized during the search of the place of business but were not

returned on the search warrant as they were not described therein. The offense of maintaining a nuisance under the National Prohibition Act was being committed in the room by the arrested bartender in the officers' presence. The search warrant was held not to cover the articles seized, but the arrest for the offense being committed in the presence of the officers was held to authorize the search for and seizure of the ledger and invoices, this Court saying:

> "The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. . . . The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose." *Marron* v. *United States,* 275 U. S. 192, 198–199.

We do not understand the *Marron* case to have been drained of contemporary vitality by *Go-Bart Co.* v. *United States,* 282 U. S. 344, and *United States* v. *Lefkowitz,* 285 U. S. 452. Those cases condemned general exploratory searches, which cannot be undertaken by officers with or without a warrant. In the instant case the search was not general or exploratory for whatever might be turned up. Specificity was the mark of the search and seizure here. There was probable cause to believe

that respondent was conducting his business illegally. The search was for stamps overprinted illegally, which were thought upon the most reliable information to be in the possession of and concealed by respondent in the very room where he was arrested, over which room he had immediate control and in which he had been selling such stamps unlawfully. *Harris* v. *United States,* 331 U. S. 145, which has not been overruled, is ample authority for the more limited search here considered. In all the years of our Nation's existence, with special attention to the Prohibition Era, it seems never to have been questioned seriously that a limited search such as here conducted as incident to a lawful arrest was a reasonable search and therefore valid.[5] It has been considered in the same pattern as search of the person after lawful arrest.

What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are "unreasonable" searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. *Go-Bart Co.* v. *United States,* 282 U. S. 344, 357. Reasonableness is in the first instance for the District Court to determine. We think the District Court's conclusion

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[5] When construing state safeguards similar to the Fourth Amendment of the Federal Constitution, state courts have shown little hesitancy in holding that incident to a lawful arrest upon premises within the control of the arrested person, a search of the premises at least to the extent conducted in the instant case is not unreasonable. See, *e. g.: Argetakis* v. *State,* 24 Ariz. 599, 212 P. 372; *Italiano* v. *State,* 141 Fla. 249, 193 So. 48; *State* v. *Conner,* 59 Idaho 695, 89 P. 2d 197; *State* v. *Carenza,* 357 Mo. 1172, 212 S. W. 2d 743; *State ex rel. Wong You* v. *District Court,* 106 Mont. 347, 78 P. 2d 353; *Davis* v. *State,* 30 Okla. Cr. 61, 234 P. 787; *State ex rel. Fong* v. *Superior Court,* 29 Wash. 2d 601, 188 P. 2d 125; *State* v. *Adams,* 103 W. Va. 77, 136 S. E. 703.

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that here the search and seizure were reasonable should be sustained because: (1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money.[6]

Assuming that the officers had time to procure a search warrant, were they bound to do so? We think not, because the search was otherwise reasonable, as previously concluded. In a recent opinion, *Trupiano* v. *United States,* 334 U. S. 699, this Court first enunciated the requirement that search warrants must be procured when "practicable" in a case of search incident to arrest. On the occasion of the previous suggestion of such a test, *Taylor* v. *United States,* 286 U. S. 1, the Court had been scrupulous to restrict the opinion to the familiar situation there presented. Prohibition agents, having received complaints for about a year, went at 2:30 a. m. to a garage adjacent to a house, flashed a light through a small opening, and then broke in and seized liquor. The Court emphasized that "No one was within the place and there was no reason to think otherwise." *Id.* at 5. Lest the holding that such a search of an unoccupied building

[6] There is no dispute that the objects searched for and seized here, having been utilized in perpetrating a crime for which arrest was made, were properly subject to seizure. Such objects are to be distinguished from merely evidentiary materials which may not be taken into custody. *United States* v. *Lefkowitz, supra,* at 464–66; *Gouled* v. *United States,* 255 U. S. 298, 309–11. This is a distinction of importance, for "limitations upon the fruit to be gathered tend to limit the quest itself . . . ." *United States* v. *Poller,* 43 F. 2d 911, 914.

was unreasonable be thought to have broader significance the Court carefully stated in conclusion: "This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. No offender was in the garage; the action of the agents had no immediate connection with an arrest. The purpose was to secure evidence to support some future arrest." *Id.* at 6.

A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the

reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that *Trupiano* v. *United States,* 334 U. S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment.

We do not treat additional questions raised by respondent in his brief to support the judgment of the Court of Appeals. We consider it appropriate to dispose of these issues on the basis of the excellent discussion below.

The motion to suppress the evidence was properly denied by the District Court. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

Trupiano v. *United States,* 334 U. S. 699, was decided on the unarticulated premise that the Fourth Amendment of itself barred the use of evidence obtained by what the Court considered an "unreasonable" search. I dissented in that case. Later, concurring in this Court's decision in *Wolf* v. *Colorado,* 338 U. S. 25, 39–40, I stated my agreement with the "plain implication" of the *Wolf* opinion that "the federal exclusionary rule is not a com-

mand of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." In the light of the *Wolf* case, the *Trupiano* rule is not a constitutional command, but rather an evidentiary policy adopted by this Court in the exercise of its supervisory powers over federal courts. *Cf. McNabb* v. *United States,* 318 U. S. 332. The present case comes within that rule: the trial court admitted certain evidence procured by a search and seizure without a search warrant although the officers had ample time and opportunity to get one. Whether this Court should adhere to the *Trupiano* principle making evidence so obtained inadmissible in federal courts now presents no more than a question of what is wise judicial policy. Although the rule does not in all respects conform to my own ideas, I think that the reasons for changing it are outweighed by reasons against its change.

In recent years, the scope of the rule has been a subject of almost constant judicial controversy both in trial and appellate courts. In no other field has the law's uncertainty been more clearly manifested. To some extent that uncertainty may be unavoidable. The *Trupiano* case itself added new confusions "in a field already replete with complexities." *Trupiano* v. *United States, supra,* 716. But overruling that decision merely aggravates existing uncertainty. For as MR. JUSTICE FRANKFURTER points out, today's holding casts doubt on other cases recently decided. And I do not understand how trial judges can be expected to foresee what further shifts may occur. In my judgment it would be wiser judicial policy to adhere to the *Trupiano* rule of evidence, at least long enough to see how it works.

That rule is based upon very strict requirements designed to narrow the occasions upon which officers can make searches and seizures without judicial warrant. Unquestionably its application will now and then permit

a guilty person to escape conviction because of hasty or ill-advised action on the part of enforcement officers. But the same may be said of the requirements of the Fourth Amendment which the exclusionary rule was fashioned to implement. The framers of the Fourth Amendment must have concluded that reasonably strict search and seizure requirements were not too costly a price to pay for protection against the dangers incident to invasion of private premises and papers by officers, some of whom might be overzealous and oppressive. See dissent in *Feldman* v. *United States,* 322 U. S. 487, 500–502. Nor can I see where the enforcement of criminal justice is likely to be seriously handicapped by adhering to the *Trupiano* holding.

I would affirm the judgment of the Court of Appeals.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, dissenting.

The clear-cut issue before us is this: in making a lawful arrest, may arresting officers search without a search warrant not merely the person under arrest or things under his immediate physical control, but the premises where the arrest is made, although there was ample time to secure such a warrant and no danger that the "papers and effects" for which a search warrant could be issued would be despoiled or destroyed?

The old saw that hard cases make bad law has its basis in experience. But petty cases are even more calculated to make bad law. The impact of a sordid little case is apt to obscure the implications of the generalization to which the case gives rise. Only thus can I account for a disregard of the history embedded in the Fourth Amendment and the great place which belongs to that Amendment in the body of our liberties as recognized and applied by unanimous decisions over a long stretch of the Court's history.

It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment. A disregard of the historic materials underlying the Amendment does not answer them.

1. It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in *Boyd* v. *United States,* 116 U. S. 616, in *Weeks* v. *United States,* 232 U. S. 383, in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, in *Gouled* v. *United States,* 255 U. S. 298, or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.

2. This is the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

These words are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words. The clue to the meaning and

scope of the Fourth Amendment is John Adams' characterization of Otis' argument against search by the police that "American independence was then and there born." 10 Adams, *Works* 247. One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable." Words must be read with the gloss of the experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed that it would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary. When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued "upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." [1] With all respect I suggest that it makes a mockery of the Fourth Amendment to sanction search without a search warrant merely because of the

[1] For a more detailed summary of the English and American history underlying the Fourth Amendment, see the dissenting opinions in *Davis* v. *United States,* 328 U. S. 582, 603–05, and *Harris* v. *United States,* 331 U. S. 145, 157–62. The impact of this history was such that every State of the Union now affords constitutional safeguards against governmental search and seizure. Its contemporary vitality is emphasized by New York's adoption of such a provision as recently as 1938. N. Y. Const. of 1938, Art. 1, § 12.

legality of an arrest. I have yet to hear the answer to Judge Learned Hand's reasoning below that to make the validity of a search

> "depend upon the presence of the party in the premises searched at the time of the arrest . . . would make crucial a circumstance that has no rational relevance to the purposes of the privilege. The feelings which lie behind it have their basis in the resentment, inevitable in a free society, against the invasion of a man's privacy without some judicial sanction. It is true that when one has been arrested in his home or his office, his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage, even though both are customarily grouped together as parts of the 'right of privacy.' . . . The history of the two privileges is altogether different; the Fourth Amendment distinguishes between them; and in statutes they have always been treated as depending upon separate conditions." 176 F. 2d 732, 735.

3. This brings me to a consideration of the right of search and seizure "incident to arrest." Undue haste in coming to that issue too readily leads to getting off the track of the Fourth Amendment. The Government argued as though the Constitution said search of premises may be at large whenever an arrest is made in them. The utterly free hand, for all practical purposes, this gives the arresting officers to rummage all over the house is, I think, inevitable unless the basis of any right to search as an incident to arrest is put in proper focus. Photographs can be so taken as to make a midget look like a giant, and vice versa. The same kind of distortion results if a legal doctrine embedded in a larger matrix of principle is taken out of the matrix and elevated to an independent position. In

plain English, the right to search incident to arrest is merely one of those very narrow exceptions to the "guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case." *Robertson* v. *Baldwin,* 165 U. S. 275, 281.

4. What, then, is the exception to the prohibition by the Fourth Amendment of search without a warrant in case of a legal arrest, whether the arrest is on a warrant or based on the historic right of arrest without a warrant if a crime is committed in the presence of the arrester? The exception may in part be a surviving incident of the historic role of "hue and cry" in early Anglo-Saxon law. See Judge Cardozo in *People* v. *Chiagles,* 237 N. Y. 193, 196, 142 N. E. 583, 584. Its basic roots, however, lie in necessity. What is the necessity? Why is search of the arrested person permitted? For two reasons: first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape, *Closson* v. *Morrison,* 47 N. H. 482, and, secondly, to avoid destruction of evidence by the arrested person. See *Reifsnyder* v. *Lee,* 44 Iowa 101, 103; *Holker* v. *Hennessey,* 141 Mo. 527, 540, 42 S. W. 1090, 1093. From this it follows that officers may search and seize not only the things physically on the person arrested, but those within his immediate physical control. What a farce it makes of the whole Fourth Amendment to say that because for many legal purposes everything in a man's house is under his control therefore his house—his rooms—may be searched. Of course in this field of law, as in others, opinions sometimes use language not with fastidious precision. Apart from such instances of loose use of language, the doctrine of search incidental to arrest has, until very recently, been strictly confined to the necessities of the situation, *i. e.,* the search

of the person and those immediate physical surroundings which may fairly be deemed to be an extension of his person.

5. Another exception to the constitutional prohibition of unreasonable searches is likewise rooted in necessity. The search without a warrant of moving objects—vehicles and vessels—was sanctioned in *Carroll* v. *United States,* 267 U. S. 132, on the ground that "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 U. S. at 153. Furthermore, the limits of the exception were carefully defined in terms of necessity, for the Court added:

> "In cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." 267 U. S. at 156.

Even as to moving vehicles, this Court did not lay down an absolute rule dispensing with a search warrant. It limited dispensation to the demands of necessity, where want of time precluded the obtaining of a warrant. The necessity founded on the time factor which guided the Court in the *Carroll* case cannot justify the search here made of the respondent's premises, for there was ample time to obtain a warrant before the arrest and even on the occasion of the arrest.

6. It is in this connection that the body of congressional enactments becomes significant, particularly legislation contemporaneous with the adoption of the Bill of Rights. If explicit legislation was deemed necessary to inspect without warrant even vessels and vehicles, and if

Congress has been very niggardly in giving authority to search even with a warrant—niggardly both as to the officers who may obtain such warrants and as to strictly defined circumstances under which search is allowed—the attitude disclosed by this impressive legislation bears powerfully on the historic purposes of the Fourth Amendment and the functions that it fulfills in our democracy. It deserves to be recalled that Congress, despite repeated requests by Attorneys General, long refused to make search by warrant generally available as an aid to criminal prosecution. It did not do so until the First World War and even then it did not do so except under conditions most carefully circumscribed.[2]

7. With only rare deviations, such as today's decision, this Court has construed the Fourth Amendment "liberally to safeguard the right of privacy." *United States* v. *Lefkowitz,* 285 U. S. 452, 464.[3] The guiding line in dealing with the Fourth Amendment was set forth in *Gouled* v. *United States,* 255 U. S. 298, 303–04:

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States,* 116 U. S. 616, in *Weeks* v. *United States,* 232 U. S. 383, and in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security,

[2] See Title XI of the Act of June 15, 1917, 40 Stat. 217, 228, now Rule 41 of the Federal Rules of Criminal Procedure. For a table of congressional legislation, indicating its scope, see the Appendix to the dissenting opinion in *Davis* v. *United States,* 328 U. S. 582, 616.

[3] See also an analysis of the cases in the Appendix to the dissenting opinion in *Harris* v. *United States,* 331 U. S. 145, 175.

> personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right, to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

8. The opinion of the Court insists, however, that its major premise—that an arrest creates a right to search the place of arrest—finds support in decisions beginning with *Weeks* v. *United States,* 232 U. S. 383. These decisions do not justify today's decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision. This progressive distortion is due to an uncritical confusion of (1) the right to search the person arrested and articles in his immediate physical control and (2) the right to seize visible instruments or fruits of crime at the scene of the arrest with (3) an alleged right to search the place of arrest. It is necessary in this connection to distinguish clearly between prohibited searches and improper seizures. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure when found by legal means. *E. g., Amos* v. *United States,* 255 U. S. 313; *Byars* v. *United States,* 273 U. S. 28; *Taylor* v. *United States,* 286 U. S. 1. Thus, the seizure of items properly subject to seizure because in open view at the time of arrest does not carry with it the right to search for such items.

The doctrine of the right to search the place of arrest announced today rests on the precarious foundation of this passage in the *Weeks* case:

> "What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, § 211; Wharton, Crim. Plead. and Practice, 8th ed., § 60; *Dillon* v. *O'Brien and Davis,* 16 Cox C. C. 245. . . . Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused." 232 U. S. 383, 392.

The statement does not even refer to a right to search the place of arrest, and the authorities cited merely support the assertion of a right to search the person arrested and to seize visible instruments or fruits of crime.[4]

The authority to search which flows from the right to arrest was next discussed by this Court in *Carroll* v. *United States,* 267 U. S. 132, 158:

> "When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."

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[4] A fair sample is § 60 of Wharton, Crim. Plead. and Practice, 8th ed.: "Right to Take Money from the Person of the Defendant," which discusses only the right to search the person arrested. Again, in *Dillon* v. *O'Brien and Davis,* 16 Cox C. C. 245, the issue was the right of arresting officers to seize apparent evidences of crime, not their right to rifle files in an effort to turn up the evidence.

While broader than the *Weeks* statement, this is still far from claiming the right to search a place merely because of an arrest there. What was said in the earlier case about articles in the control of the arrested person not being in issue is now stated positively as a right to seize whatever is found in the control of the person arrested. This *Carroll* statement is based on what was said in *Weeks,* and on two State cases which did not enunciate a right to search the place of arrest.[5]

These limited statements in the *Weeks* and *Carroll* opinions were uncritically expanded in *Agnello* v. *United States,* 269 U. S. 20, 30:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States,* 232 U. S. 383, 392."

If such a right was "not to be doubted" it certainly cannot be supported by the cases cited. *Carroll* and *Weeks* may

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[5] *Getchell* v. *Page,* 103 Me. 387, 69 A. 624, was an action for trespass for the seizure of accoutrements of liquor-making under a warrant which authorized the search and seizure of intoxicating liquor. The decision that the officer was not liable for the seizure under those circumstances does not support an independent right to search the place of arrest. In *Kneeland* v. *Connally,* 70 Ga. 424, 425, the other case cited, the court actually held that the trial court had no jurisdiction of the case. It went on to say that "just as a warrant to arrest a man charged with murder would carry with it authority to seize the bloody knife or smoking pistol which killed," the instruments of the crime of gaming could be seized in arresting a proprietor of a gambling house. But once again no authority to search for these instruments was suggested.

have established a right to seize visible evidences of crime and to search the person arrested and even objects he physically controls, but neither case so much as hints that there is a right to search the entire place of arrest for "things connected with the crime."

In *Marron* v. *United States,* 275 U. S. 192, these carelessly phrased dicta were for the first time reflected in the result. The statement in the opinion that officers "had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise," 275 U. S. at 199, was drastically qualified by *Go-Bart Co.* v. *United States,* 282 U. S. 344, and *United States* v. *Lefkowitz,* 285 U. S. 452. The teaching of those cases is that the warrant of arrest carries with it authority to seize all that is on the person, or in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person. The *Lefkowitz* decision emphasized that the things seized in *Marron* "being in plain view were picked up by the officers as an incident of the arrest. No search for them was made." 285 U. S. at 465. Thus explained, *Marron* stands merely for the historically justified right to seize visible instruments of crime at the scene of the arrest.

In reliance on the prior dicta and on the *Marron* decision, it was asserted in *Harris* v. *United States,* 331 U. S. 145, 150, that "Search and seizure incident to lawful arrest is a practice of ancient origin." Literally, this is true: the right to search the person arrested and to seize visible instruments of crime has a good legal title. But judicial history cannot be avouched if this statement is meant to cover the right to search the place of arrest. Such a claim can only be made by sliding from a search of the person to a search for things in his "possession" or "in his immediate control," without regard to the treacherous ambiguity of these terms, and then using

these phrases, taken out of their original context, so as to include the entire premises.

The short of it is that the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it.

9. If the exception of search without a warrant incidental to a legal arrest is extended beyond the person and his physical extension, search throughout the house necessarily follows. I am aware that most differences in the law depend on differences of degree. But differences though of degree must not be capricious; the differences must permit rational classification. If upon arrest you may search beyond the immediate person and the very restricted area that may fairly be deemed part of the person, what rational line can be drawn short of searching as many rooms as arresting officers may deem appropriate for finding "the fruits of the crime"? Is search to be restricted to the room in which the person is arrested but not to another open room into which it leads? Or, take a house or an apartment consisting largely of one big room serving as dining room, living room and bedroom. May search be made in a small room but not in such a large room? If you may search the bedroom part of a large room, why not a bedroom separated from the dining room by a partition? These are not silly hard cases. They put the principle to a test. The right to search an arrested person and to take the stuff on top of the desk at which he sits has a justification of necessity which does not eat away the great principle of the Fourth Amendment. But to assume that this exception of a search incidental to arrest permits a free-handed search without warrant is to subvert the purpose of the Fourth Amendment by making the exception displace the principle. History and the policy which it represents alike admonish against it.

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10. To tear "unreasonable" from the context and history and purpose of the Fourth Amendment in applying the narrow exception of search as an incident to an arrest is to disregard *the* reason to which reference must be made when a question arises under the Fourth Amendment. It is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest. The test by which searches and seizures must be judged is whether conduct is consonant with the main aim of the Fourth Amendment. The main aim of the Fourth Amendment is against invasion of the right of privacy as to one's effects and papers without regard to the result of such invasion. The purpose of the Fourth Amendment was to assure that the existence of probable cause as the legal basis for making a search was to be determined by a judicial officer before arrest and not after, subject only to what is necessarily to be excepted from such requirement. The exceptions cannot be enthroned into the rule. The justification for intrusion into a man's privacy was to be determined by a magistrate uninfluenced by what may turn out to be a successful search for papers, the desire to search for which might be the very reason for the Fourth Amendment's prohibition. The framers did not regard judicial authorization as a formal requirement for a piece of paper. They deemed a man's belongings part of his personality and his life. In dealing with the question, this Court in *United States* v. *Lefkowitz,* 285 U. S. 452, 464, approvingly cited what was said by Judge Learned Hand in *United States* v. *Kirschenblatt,* 16 F. 2d 202, 203:

> "Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either

by means of a search warrant or by his consent. The second is a practice which English-speaking peoples have thought intolerable for over a century and a half. It was against general warrants of search, whose origin was, or was thought to be, derived from Star Chamber, and which had been a powerful weapon for suppressing political agitation, that the decisions were directed, of which Entick v. Carrington, 19 How. St. Trials, 1029, is most often cited. These cases were decided just after the colonists had been hotly aroused by the attempt to enforce customs duties by writs of assistance, and when within 30 years they framed the Fourth Amendment it was general warrants that they especially had in mind. Boyd v. U. S., 116 U. S. 616 . . . .

"After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

11. By the Bill of Rights the founders of this country subordinated police action to legal restraints, not in order to convenience the guilty but to protect the innocent. Nor did they provide that only the innocent may appeal to these safeguards. They knew too well that the successful prosecution of the guilty does not require jeopardy to the innocent. The knock at the door under the guise of a warrant of arrest for a venial or spurious offense was not unknown to them. Compare the statement in *Weeks* v. *United States,* 232 U. S. 383, 390, that searches and seizures had been made under general warrants in England "in support of charges, real or imaginary." We have had grim reminders in our day of their experience. Arrest under a warrant for a minor or a trumped-up charge has been familiar practice in the past, is a commonplace in the police state of today, and too well-known in this country. See *Lanzetta* v. *New Jersey,* 306 U. S. 451. The progress is too easy from police action unscrutinized by judicial authorization to the police state. The founders wrote into the Constitution their conviction that law enforcement does not require the easy but dangerous way of letting the police determine when search is called for without prior authorization by a magistrate. They have been vindicated in that conviction. It may safely be asserted that crime is most effectively brought to book when the principles underlying the constitutional restraints upon police action are most scrupulously observed.

The highly experienced Commission on Law Observance and Enforcement appointed by President Hoover spoke of "the high standards of conduct exacted by Englishmen of the police." Vol. IV Reports of the National Commission on Law Observance and Enforcement ("Lawlessness in Law Enforcement") p. 259. It is suggested that we cannot afford the luxury of such

theoretically desirable subordination of the police to law because greater obedience to law is part of English life generally. I do not think that acceptance of lower standards than those prevailing in England should be written by us into law. That only serves to encourage low standards, not to elevate them. It is unfair to our people to suggest that they cannot attain as high standards as do the British in guarding against police excesses without impairing effective means for combatting crime. Experience proves that it is a counsel of despair to assume that the police cannot be kept within the bounds of the principles which the Fourth and Fifth Amendments embody except at the cost of impotence in preventing crime and dealing sternly with its commission.

12. To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an "unreasonable search" is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response. There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant, *i. e.*, the justifications that dispense with search warrants when searching the person in his extension, which is his body and that which his body can immediately control, and moving vehicles. It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable.

13. Even if the test of reasonableness is to be taken out of the context of the history and purpose of the

Fourth Amendment, the test should not be limited to examination of arresting officers' conduct in making the arrest. Their conduct prior to arrest is no less relevant. In any event, therefore, the presence or absence of an ample opportunity for getting a search warrant becomes very important. It is not a rule of thumb. It is a rule of the Fourth Amendment and of the reasons for its adoption. It is not a rule invented in *Trupiano* v. *United States,* 334 U. S. 699. It is not a rule of those who came on this Court in recent years. The decision in *Taylor* v. *United States,* 286 U. S. 1, turned on it. It was not a sentimental Court that stated in *Taylor:*

> "Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility." 286 U. S. at 6.

That the arrest in that case was made after the search was begun does not affect its importance. Opportunity to obtain a search warrant is either relevant or irrelevant in determining the application of the Fourth Amendment. As the Court conceives the test of unreasonableness, different factors may be given varying weight. But opportunity to obtain a warrant cannot be relevant in one situation and totally irrelevant in another. That is the significance of the *Taylor* case.

In the case before us there is not the slightest suggestion that the arresting officers had not the time to

secure a search warrant. The arrest and search were made on February 16, 1943. On February 1, there was strong evidence that respondent had in his possession large numbers of stamps bearing forged overprints, in violation of 18 U. S. C. § 265. On February 6, a postal employee purchased from respondent four stamps bearing overprints and, on February 9, reports were received showing the overprints to be forgeries. Thus, the Government had at least seven, and more accurately fifteen, days in which to procure a search warrant. Nor was this a case in which the need for a search became apparent at the time of arrest. The arresting officers were accompanied by two stamp experts, whose sole function was to examine the fruits of the search which they knew would be made. This is hardly a natural description of a "search incidental to an arrest."

It is most relevant that the officers had "no excuse for not getting a search warrant," 176 F. 2d 732, 735, for that is precisely what the Fourth Amendment was directed against—that some magistrate and not the police officer should determine, if such determination is not precluded by necessity, who shall be rummaging around in my room, whether it be a small room or a very large room, whether it be one room, or two rooms, or three rooms, or four rooms.

14. It is not as though we are asked to extend a mischievous doctrine that has been shown to hamper law enforcers. We are asked to overrule decisions based on a long course of prior unanimous decisions, drawn from history and legislative experience. In overruling *Trupiano* we overrule the underlying principle of a whole series of recent cases: *United States* v. *Di Re,* 332 U. S. 581; *Johnson* v. *United States,* 333 U. S. 10; *McDonald* v. *United States,* 335 U. S. 451, based on the earlier cases. For these cases ought not to be allowed to remain as

derelicts on the stream of the law, if we overrule *Trupiano*. These are not outmoded decisions eroded by time. Even under normal circumstances, the Court ought not to overrule such a series of decisions where no mischief flowing from them has been made manifest. Respect for continuity in law, where reasons for change are wanting, alone requires adherence to *Trupiano* and the other decisions. Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors.

Syllabus.

UNITED STATES v. BURNISON ET AL.

NO. 171. APPEAL FROM THE SUPREME COURT OF CALIFORNIA.*

Argued December 13, 1949.—Decided March 13, 1950.

Section 27 of the Probate Code of California, as construed by the highest court of the State, prevents a California domiciliary from making an unrestricted testamentary gift to the United States of property, real or personal, located within the State, although such a gift may be made to the State, its counties or municipal corporations. *Held:*

1. The construction of the section by the highest court of the State is binding here, but the question of its validity under the Federal Constitution is for this Court to determine. P. 89.

2. The section, as construed, does not violate the Supremacy Clause of the Federal Constitution. Pp. 90–93.

(a) The power of the United States to receive testamentary gifts does not preclude a State from denying a testator the right to will his property to the United States. *United States* v. *Fox*, 94 U. S. 315. Pp. 90–93.

(b) The Tenth Amendment reserves to the States the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries. Pp. 91–93.

(c) In the determination of the question here involved, no distinction is to be drawn between realty and personalty. P. 93.

3. The section, as construed, does not discriminate against the United States in violation of the Federal Constitution. Pp. 93–95.

(a) Decisions upholding the right of persons to sue in state courts on federally created rights are not in point here. Pp. 93–94.

(b) Assuming that the United States is protected by the Equal Protection Clause of the Fourteenth Amendment, the section is nevertheless justified by the State's close relationship to its residents and their property. P. 95.

33 Cal. 2d 638, 647, 204 P. 2d 330, 335, affirmed.

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*Together with No. 188, *United States* v. *Gayetty et al.*, also on appeal from the same court.

The Supreme Court of California held void under state law certain testamentary gifts to the United States and directed that the property be distributed to the statutory heirs of each decedent. 33 Cal. 2d 638, 647, 204 P. 2d 330, 335. On appeal to this Court, *affirmed*, p. 95.

Melvin Richter argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Joseph W. Bishop, Jr.* and *Paul A. Sweeney.*

J. Harold Decker argued the cause for appellees. With him on the brief for appellees in No. 188 was *J. P. Patterson.*

Casper A. Ornbaun and *Everett H. Roan* filed a brief for Burnison; and *Frank J. Fontes* was of counsel for Katz, appellees in No. 171.

Mr. Justice Reed delivered the opinion of the Court.

These appeals involve the power of the California Supreme Court to declare invalid testamentary dispositions to the United States by two California residents. The bequest to the United States in No. 171 included only personal property; in No. 188 the United States was designated to receive both real property and United States bonds. The situs of all the property is assumed to be California. After appropriate procedural steps, the California Supreme Court held void these testamentary gifts and directed that they be distributed to the statutory heirs of each decedent.[1] The two cases were consolidated for argument below and will be considered here in one opinion.

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[1] *Estate of Burnison*, 33 Cal. 2d 638, 204 P. 2d 330; *Estate of Sanborn*, 33 Cal. 2d 647, 204 P. 2d 335.

The California court construed § 27 of the California Probate Code [2] to prevent a California domiciliary from making an unrestricted testamentary gift to the United States, although such a gift may be made to California, its counties and municipal corporations.[3] The court arrived at this interpretation despite the contention of the United States that it would raise serious constitutional questions. The construction of the California Code by the California Supreme Court is, of course, binding on us. It leaves us, however, with the federal constitutional questions that the United States urged the California court to avoid.

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[2] Probate Code of California, § 27:

"*Who may take by will.* A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

[3] One judge dissented on the authority of *Estate of Hendrix*, 77 Cal. App. 2d 647, 651–53, 176 P. 2d 398, 400–402. The Hendrix will bequeathed property to the United States Veterans' Administration for the aid, comfort and assistance of disabled veterans. The California District Court of Appeal, at 651, declared that this was really a bequest to the United States, a corporation, and that its agency, the designated beneficiary, was expressly authorized by California Probate Code § 27 to take property under a will. Thus the bequest was valid. In its opinion in the present case, the Supreme Court held that this language had been unnecessary to the decision and refused to extend it to the gifts now under consideration. It thought that the Hendrix gift was good as one for charitable purposes to a legally constituted institution. The Supreme Court thought a gift to the United States "without qualification as to administration or purpose," 33 Cal. 2d 646, 204 P. 2d 335, did not come under the classifications of associations or corporations in § 27.

In these appeals the United States makes two contentions. It urges that the California Code, as interpreted, violates the Supremacy Clause of the Constitution in that it infringes upon the "inherent sovereign power" of the United States to receive testamentary gifts. Alternatively it argues that the Code effects an unconstitutional discrimination against the National Government, since a testamentary gift may be made by a Californian to California, but may not be made to the United States.

We have no doubt that the receipt of gifts, testamentary and nontestamentary, is within the ambit of federal powers. Uninterrupted usage from the foundation of the Government has sanctioned it. The first question here, therefore, is whether the power to receive testamentary gifts reaches so far as to forbid a state to deny a testator the right to will his property to the United States.

To answer this question affirmatively would require us to overrule *United States* v. *Fox,* 94 U. S. 315, decided at the 1876 Term by a unanimous Court and frequently cited with approval. A devise of New York realty to the United States had been held void by the Court of Appeals[4] under a New York statute that declared land in New York could be devised only to natural persons and such corporations as New York had expressly authorized to take by devise. Although it was not specifically urged that the Supremacy Clause precludes a state's interference with the power of the United States to receive testamentary gifts, this point was necessarily involved in the United States' argument that the New York prohibition violated an essential attribute of national sovereignty—the right to acquire property by all methods known to the law. In affirming, this Court held

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[4] *Matter of Will of Fox,* 52 N. Y. 530.

that the power to control devises of property was in the State, and that therefore a person must "devise his lands in that State within the limitations of the statute or he cannot devise them at all." [5]

In asking us to overrule the *Fox* case, the United States contends that since it has the power to accept testamentary gifts, the Supremacy Clause bars a state from stopping this stream of federal revenue at its source. The argument is that every authorized activity of the United States represents an exercise of its governmental power,[6] and that therefore the power to receive property through a will is a governmental power. Since a state cannot interpose "an obstacle to the effective operation of a federal constitutional power," [7] the Government argues a state cannot interfere with this power to receive. This argument fails to recognize that the state acts upon the power of its domiciliary to give and not on the United States' power to receive. As a legal concept a transfer of property may be looked upon as a single transaction or it may be separated into a series of steps. The approach chosen may determine legal consequences.[8] Where powers flow so distinctly from different sources as do the power to will and the power to receive, we think the validity of each step is to be treated separately.

The United States would have no semblance of a claim here were it not for wills probated under California law. The *Fox* case is only one of a long line of cases which have consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth

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[5] *United States* v. *Fox*, 94 U. S. 315, 321.

[6] *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 32; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102.

[7] *United States* v. *Belmont*, 301 U. S. 324, 331–32.

[8] *Gregory* v. *Helvering*, 293 U. S. 465.

Amendment,[9] is the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries.[10] It would be anomalous to hold that, because of an amorphous doctrine of national sovereignty, federal constitutional law reached into a California statute and made impotent that state's restrictions on the designation of beneficiaries.

The United States' argument leads to the conclusion that no obstruction whatever may be put in the way of the United States' power to receive by will. Thus the United States could claim rights under the will of a testator whom the state had declared incompetent, or under a will that had not been witnessed and attested according to the laws of the state. The United States could take to the complete exclusion of a surviving spouse, notwithstanding the state law.

The case of *United States* v. *Perkins,* 163 U. S. 625, makes clear that obstacles may be put by states to the passage of property by will to the United States. There the New York Court of Appeals had upheld the application of the New York inheritance tax to personalty bequeathed the United States. Although there is no doubt that where the United States acts in its sovereign capacity, it is free from state taxes on that activity,[11] this Court, in affirming, said:

> "Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right

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[9] *United States* v. *Sprague,* 282 U. S. 716, 733; *United States* v. *Darby,* 312 U. S. 100, 123.

[10] *Mager* v. *Grima,* 8 How. 490, 493–94; *United States* v. *Fox,* 94 U. S. 315, 321; *United States* v. *Perkins,* 163 U. S. 625, 627, 628; *Plummer* v. *Coler,* 178 U. S. 115, 137; *Maxwell* v. *Bugbee,* 250 U. S. 525, 536; *Lyeth* v. *Hoey,* 305 U. S. 188, 193; *Irving Trust Co.* v. *Day,* 314 U. S. 556, 562; *Demorest* v. *City Bank Co.,* 321 U. S. 36, 48.

[11] *Mayo* v. *United States,* 319 U. S. 441.

> to require a contribution to the public treasury before the bequest shall take effect. . . .
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> . . . . . .
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> "We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it." [12]

We shall not overrule the *Fox* case, and, of course, we find no distinction between realty and personalty. Within broad limits, the state has power to say what is devisable and to whom it may be given. We may assume with the United States that the state's power over testamentary gifts is not absolute,[13] but we find nothing in the Supremacy Clause which prohibits the state from preventing its domiciliary from willing property to the Federal Government.[14]

The alternative contention is that § 27 of the Probate Code, as interpreted, discriminates against the United States in violation of the Constitution. The argument is that even if the Supremacy Clause would not be vio-

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[12] *United States* v. *Perkins*, 163 U. S. 625, 628, 630.

[13] *Clark* v. *Allen*, 331 U. S. 503. Cf. *Oyama* v. *California*, 332 U. S. 633.

[14] As was pointed out in the *Fox* case, our determination does not affect the right of the United States to acquire property by purchase or eminent domain in the face of a prohibitory statute of the state. *Kohl* v. *United States*, 91 U. S. 367. An authorized declaration of taking or a requisition will put realty or personalty at the disposal of the United States for "just compensation." It may tax testamentary transfers. Its powers will not suffer.

lated if the statute provided that no governmental body could be made the beneficiary of a California will, there is a violation of the Supremacy Clause when the United States is treated less advantageously than California. Apparently the capacity of the United States to receive gifts is analogized to the right of a person to sue on a federal cause of action in a state court. Reliance is placed on the cases which have held that federal rights must be enforced by the courts of a state when "ordinary jurisdiction as prescribed by local laws is appropriate to the occasion." [15] Thus, urges appellant, since state courts may not discriminate in the availability of judicial relief between state created rights and federally created rights, no more can a state discriminate between California and the United States as beneficiaries under wills.

When a state refuses to hear pleas based on federally created rights while it takes cognizance of those created by state law, there may be invalid discrimination because by the Supremacy Clause federal laws are made laws of the state.[16] Therefore to allow a suit based on state law and to refuse one based on federal law could "discriminate" without any reason for the classification.[17] But the United States' capacity to receive, even though called a "right" or a "power," is not a "law of the state." As we have shown in the earlier discussion, that capacity cannot be magically transformed into something that must be enforced. The cases upholding the rights of persons to sue are not in point.

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[15] *Second Employers' Liability Cases,* 223 U. S. 1, 56; *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U. S. 377; *McKnett* v. *St. Louis & S. F. R. Co.,* 292 U. S. 230.

[16] *Claflin* v. *Houseman,* 93 U. S. 130, 136; *Second Employers' Liability Cases, supra,* 57.

[17] *McKnett* v. *St. Louis & S. F. R. Co., supra,* 234; cf. *Douglas* v. *New York, N. H. & H. R. Co., supra.*

In a sense, of course, the United States is being treated differently from California, and differences and distinctions in a state's treatment of persons are frequently claimed to be discriminatory in violation of the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment. But such differences and distinctions, even when applied to persons clearly protected by the Fourteenth Amendment, are not in themselves unconstitutional. It is only when the variations are arbitrary and without reasonable legal basis that an unconstitutional discrimination occurs. A long line of decisions has molded this judicial concept.[18] Thus, although we should make the somewhat dubious assumption that the United States must receive equal protection under the Fourteenth Amendment, there is no constitutional violation. California's decision to permit only itself and its subordinate municipalities to be unlimited governmental beneficiaries under the wills of its domiciliaries is based on a permissible distinction. It is justified by reason of the state's close relationship with its residents and their property.[19] A state may by statute properly prefer itself in this way, just as states have always preferred themselves in escheat.

Affirmed.

MR. JUSTICE BLACK dissents.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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[18] *E. g., Denver* v. *New York Trust Co.*, 229 U. S. 123; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *La Tourette* v. *McMaster*, 248 U. S. 465; *Maxwell* v. *Bugbee*, 250 U. S. 525; *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573; *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80.

[19] *Board of Education* v. *Illinois*, 203 U. S. 553; cf. *Connecticut Mutual Life Ins. Co.* v. *Moore*, 333 U. S. 541, 551.

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AFFOLDER *v.* NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 200. Argued November 18, 1949.—Decided March 13, 1950.

In this action against a railroad under the Safety Appliance Act and the Federal Employers' Liability Act, based on an alleged violation of the automatic-coupler requirement of the Safety Appliance Act, it appeared from the evidence that the plaintiff, a switchman, lost a leg in his attempt to stop a string of moving cars which had separated from others after an earlier failure of two of them to couple on impact. The verdict of the jury and the judgment of the trial court were for the plaintiff. *Held:*

1. The issue of proximate cause was properly determined in favor of the plaintiff. *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430. P. 98.

2. The duty of the carrier under the automatic-coupler requirement of the Safety Appliance Act is unrelated to negligence, but is an absolute one requiring proper performance of the couplers on the occasion in question. *O'Donnell* v. *Elgin, J. & E. R. Co.*, 338 U. S. 384. P. 98.

3. The charge of the trial court in this case sufficiently informed the jury as to the relevant legal rules. It did not deprive the railroad of a defense based on the possibility that the separation of the cars was due to the plaintiff's failure to open the coupler. Pp. 98–100.

4. In the circumstances of this case, the amount of damages ($80,000) awarded by the trial court's judgment was not excessive. P. 101.

174 F. 2d 486, reversed.

In an action under the Safety Appliance Act and the Federal Employers' Liability Act, the District Court entered judgment for the plaintiff. The Court of Appeals reversed. 174 F. 2d 486. This Court granted certiorari. 338 U. S. 813. *Reversed*, p. 101.

William H. Allen argued the cause for petitioner. With him on the brief was *Mark D. Eagleton.*

Lon Hocker argued the cause and filed a brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

We have for review a judgment of the Court of Appeals for the Eighth Circuit, reversing petitioner's recovery of an $80,000 judgment against the respondent railroad based on an alleged violation of the Federal Safety Appliance Act [1] and the Federal Employers' Liability Act.[2] Petitioner was a member of a crew engaged in classifying, or sorting, a number of railroad cars in the respondent's yards. Twenty-four cars had been coupled together on one track. The twenty-fifth, a Rock Island car, was kicked eastward down the track to couple with the others. It did so, its east end joining the other cars. A Pennsylvania car was the next car kicked eastward down the track, but it and the Rock Island car failed to couple together. After three or four other cars had been added, the Rock Island car and the twenty-four others to which it was attached began rolling down the track. Petitioner ran after the moving train of cars in an attempt to board and stop them, as was his duty. His leg was lost as he fell under a car in this attempt.

The trial was to a jury, petitioner contending that the failure of the Pennsylvania car to join the Rock Island car on impact was in itself a violation of the Safety Appliance Act, resulting in the separation and

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[1] "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 27 Stat. 531, 45 U. S. C. § 2.

[2] 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60.

his injury. Respondent took the position that the criterion of the Act is, "were they [the cars] equipped with efficient couplers?" and not "did they [the couplers] in fact fail to couple?"; and that if there was a violation of the Act, it was not the proximate cause of the injury. The jury returned a verdict for $95,000 which, upon remittitur, was reduced to $80,000. A judgment in this amount was entered. 79 F. Supp. 365 (1948). On appeal the judgment was reversed. 174 F. 2d 486 (1949). We granted certiorari. 338 U. S. 813 (1949).

The Court of Appeals determined the issue of proximate cause favorably to petitioner, and respondent admits that the "problem of causal connection *vel non* in the Affolder case is legally identical with the same problem in the Carter case. [*Carter* v. *Atlanta & Saint Andrews Bay R. Co.*, 338 U. S. 430 (1949).]" We agree and consequently hold the issue correctly determined below.

Nor do we think that any question regarding the normal efficiency of the couplers is involved in an action under the Safety Appliance Acts. As we said in *O'Donnell* v. *Elgin, Joliet & Eastern R. Co.*, 338 U. S. 384 (1949), and the *Carter* case, *supra,* the duty under the Acts is not based on the negligence of the carrier but is an absolute one requiring performance "on the occasion in question."

The Court of Appeals based its disposition of the case on the reasoning that the charge [3] given the jury contained "no explanation of the legal effect" of the direct proof of the separation of the cars "and the permissible use which the jury could make of it . . . ." We think the Court of Appeals erroneously concluded that the jury could find for the plaintiff only if it inferred "bad condition of the couplers and consequent violation of defendant's statutory duty . . . ." This was the same error

[3] The trial court's charge is set out at length in the opinion of the Court of Appeals, 174 F. 2d 486, 488–491.

the Court of Appeals for the Seventh Circuit made in *O'Donnell, supra,* in an opinion relied upon by respondent in the present cause. In subsequently reversing the judgment of the Court of Appeals, we held that the plaintiff did not have to show a "bad" condition of the coupler; she was entitled to a peremptory instruction that to equip a car with a coupler which failed to perform properly "in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability." Further, we said, "a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong . . . ."

Of course this assumes that the coupler was placed in a position to operate on impact. Thus, if "the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened," the railroad had a good defense. The Court of Appeals also found fault with the charge on the ground that it deprived defendant of this defense. We cannot agree. The trial court directed the jury at least three times that it was for them to determine the reason why the cars separated and specifically called their attention to the testimony of the head switchman, thus emphasizing the possibility that his failure, if any, to open the coupler was the cause of the separation. Likewise, the argument of counsel, both for plaintiff and defendant, clearly reveals that the sole question with regard to this issue was whether, after the couplers were placed in open or proper position, they failed to couple automatically on impact.[4] The

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[4] Defendant had introduced in evidence a small model of the coupler involved and an expert had demonstrated its workings to the jury. Counsel for defendant argued to the jury: "He [plaintiff's counsel] says it is only necessary to show that there was no coupling. I say he is wrong. I say he must show that there was a failure to

jury, by its verdict, resolved the question against the respondent.

We think the charge, taken as a whole, sufficiently informed the jury of the relevant legal rules.

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couple because the car was not equipped with couplers coupling automatically on impact. If they did not couple, and if they did not couple because of some other reason . . . then there is no liability in this case." Defendant's counsel, in using the model, explained his position: If "this lock was held up so that the knuckle would not lock back, it was closed, tell me, ladies and gentlemen, would this knuckle be opened or closed following the accident? Well, obviously, if the failure of the coupling to make was because the knuckle was not locked closed, it would have to be open following the accident, and Millikan testified that the knuckle [an hour after the accident] was not only closed . . . but the pin was seated, the lock was down . . . . Now, the answer to that, ladies and gentlemen, is the only possible answer . . . this knuckle was closed when the Pennsylvania car was kicked down on to the Rock Island car."

Plaintiff's counsel countered:

"I don't say, and never told you, never will, nor will the Court, that if there is merely separation of cars, plaintiff shall recover. I simply told you, if there is a separation of cars after those devices were put in operation and did not operate, then they failed to perform their duty, regardless of how they operated before or since, and that we do not have to prove—and the Court will tell you that emphatically—any defect."

As to whether the knuckle was opened, there was this argument by plaintiff's counsel:

"Now, let me ask you, did Tielker [the head switchman] open that knuckle or not open it? He says that when he went to open that knuckle, he had difficulty in opening it—he had to push it three times, when it failed to open the first time, showing something was stuck.

. . . . . .

"This bad-order card—remember this is on the front end of it—and that is car Pennsylvania 727512. . . . they find that bent operating lever rod, or bent operating lever bracket, don't they? They find that themselves. This is their card, this is their record.

"What does this card do then that I have in my hand? What does it do? It confirms Tielker, doesn't it?"

We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case. *Barry* v. *Edmunds,* 116 U. S. 550 (1886). Accordingly, the judgment of the Court of Appeals is reversed and that of the District Court affirmed.

Reversed.

MR. JUSTICE REED dissents. He would affirm on the failure of the trial court to make clear to the jury that the carrier was not liable under the Safety Appliance Act if the failure to couple was due to negligence in setting the coupler. See *New York, C. & St. L. R. Co.* v. *Affolder,* 174 F. 2d 486, 491, and *O'Donnell* v. *Elgin, J. & E. R. Co.,* 338 U. S. 384, 394, note 7.

MR. JUSTICE FRANKFURTER would dismiss this writ as improvidently granted, for reasons set forth by him in *Carter* v. *Atlanta & St. Andrews Bay R. Co.,* 338 U. S. 430, 437.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE JACKSON, dissenting.

The only issue surviving in this case is whether the charge gave the jury a sufficiently clear and correct knowledge of the law to be applied.

The Court of Appeals thought the charge as a whole "very probably gave the jury the impression" that it need only find that two cars failed to couple on impact to establish a violation of the Safety Appliance Act. This, as the Court recognizes, is not the law. Before a failure to couple establishes a defective coupler, it must be found that it was properly set so it could couple. If it was not adjusted as such automatic couplers must be, of course the failure is not that of the device.

The instructions contained language quoted by this Court that would suggest this rule. Other language was used, however, which might well cancel the effect of that quoted. Judge Collet, for the Court of Appeals, said, "We are unable to escape the conclusion that the instruction was not sufficiently clear and definite in that respect." 174 F. 2d at 491.

If the charge seemed so foggy to a Court of Appeals, generally familiar with what the trial judge was driving at, I do not see how this Court can be so confident that it did not mislead a jury of laymen. That confidence is all upon which we reverse the judgment. We cannot know any more about its effect than did the Court of Appeals; and that court happened to have been composed of judges, two of whom have had the experience of presiding over jury trials in District Court, which gives them a better informed mind on the subject than we have. I should be inclined to agree with them that the charge leaves the subject in so much confusion that I do not know just what the instruction did amount to. The most that can happen under the decision now being reversed is to resubmit the case to a jury that probably would be more carefully and clearly instructed.

In any event, I do not think this is the kind of issue that meets the qualifications we have ourselves laid down for grant of certiorari. Supreme Court Rule 38 (5). No question of law is, or could be, settled unless we could devise some measure of incoherence so that lower courts would know how much we will think is too much. Short of that, we only substitute our own impression for that of the Court of Appeals as to the probable psychological effect of the instruction in this individual case. All that was written in favor of dismissing a writ as improvidently granted in *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 437, and *Wilkerson* v. *McCarthy*, 336 U. S. 53, 65–77, seems especially applicable here. I would dismiss this writ as improvidently granted.

HIATT, WARDEN, *v.* BROWN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 359. Argued February 6–7, 1950.—Decided March 13, 1950.

Respondent, a soldier in the United States Army in Germany, was convicted of murder by a general court-martial and was sentenced to imprisonment. At the time of the trial, in 1947, the 8th Article of War required the authority appointing a general court-martial to detail as law member thereof an officer of the Judge Advocate General's Department, except when an officer of that department was "not available for the purpose." In the order of the commanding general appointing the general court-martial which tried respondent, the only officer named from the Judge Advocate General's Department was a captain who was designated as one of the assistant trial judge advocates, and he was absent from the trial on verbal orders of the commanding general. An order of the District Court sustaining a writ of habeas corpus and ordering respondent discharged was affirmed by the Court of Appeals. *Held:*

1. The judgment of the Court of Appeals is reviewable by this Court on certiorari under 28 U. S. C. § 1254. P. 106, n. 1.

2. The record in this case does not disclose any disregard of the 8th Article of War in the appointment of the general court-martial. Pp. 106–110.

(a) The fact that an officer of the Judge Advocate General's Department was detailed to a general court-martial in another capacity, and that nothing otherwise appeared to negative his availability as a law member, does not require the conclusion that he was "available" for appointment as law member, within the meaning of the 8th Article of War. Pp. 107–108.

(b) The availability of an officer of the Judge Advocate General's Department as law member of a general court-martial was intended by Congress to be a matter within the sound discretion of the appointing authority. P. 108.

(c) In the 8th Article of War, the phrase "available *for the purpose*" connotes an exercise of discretion by the appointing authority. Pp. 108–109.

(d) In the determination of the meaning of the 8th Article of War, this Court accords great weight to an interpretation of

the Article which has been consistently given and applied by the Army. P. 109.

(e) The exercise of the discretion conferred on the appointing authority by the 8th Article may be reviewed by the courts only if a gross abuse of that discretion would have given rise to a defect in the jurisdiction of the court-martial; and whether the 8th Article imposes a requirement going to the jurisdiction need not here be determined, for nothing in the record indicates that the discretion of the appointing authority was improperly exercised. Pp. 109–110.

(f) On the record in this case, no abuse of the discretion of the appointing authority is disclosed by the appointment of an officer of the Judge Advocate General's Department in a capacity other than law member, or by reassignment of that officer to other duty at the time of the trial, or by the standard of competence in legal matters shown by the law member at the trial. P. 110.

3. The proceeding in the Court of Appeals being in habeas corpus, that court erred in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel. Pp. 110–111.

(a) In a habeas corpus proceeding to obtain the release of one under sentence of a court-martial, the single inquiry is as to the jurisdiction of the court-martial. P. 111.

(b) The general court-martial in this case had jurisdiction of the person accused and of the offense charged, and acted within its lawful powers. P. 111.

(c) The correction of any errors which may have been committed by the general court-martial is for the military authorities, which are alone authorized to review its decision. *In re Yamashita*, 327 U. S. 1, 8–9. P. 111.

175 F. 2d 273, reversed.

In a habeas corpus proceeding to secure respondent's release from imprisonment under a sentence of a general court-martial, the District Court sustained the writ and

ordered respondent discharged. 81 F. Supp. 647. The Court of Appeals affirmed. 175 F. 2d 273. This Court granted certiorari. 338 U. S. 890. *Reversed,* p. 111.

Stanley M. Silverberg argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, James M. McInerney, Robert S. Erdahl, Philip R. Monahan* and *Israel Convisser.*

Walter G. Cooper argued the cause and filed a brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

Respondent, while serving as an enlisted soldier in the United States Army in Germany, was convicted by a general court-martial of committing murder on December 25, 1946, in violation of the 92d Article of War, 41 Stat. 805, 10 U. S. C. § 1564. The sentence imposed was dishonorable discharge, forfeiture of all pay and allowances, and life imprisonment, which was reduced to twenty years upon recommendation of the Judge Advocate General. On petition for a writ of habeas corpus, the District Court for the Northern District of Georgia ordered respondent discharged from the federal penitentiary in Atlanta, 81 F. Supp. 647 (1948), and the Court of Appeals for the Fifth Circuit affirmed, one judge dissenting. 175 F. 2d 273 (1949). Both the District Court and the Court of Appeals concluded that the military tribunal which convicted respondent was improperly constituted and lacked jurisdiction of the offense. The Court of Appeals held further that the record was "replete with highly prejudicial errors and irregularities" which deprived respondent of due process of law under the Fifth Amendment and afforded an independent ground for sustaining the writ. We brought the case here, on petition of the warden having custody of respondent, in view of the

importance of the decision below in the administration of military justice. 338 U. S. 890 (1949). Our jurisdiction to review the judgment of the Court of Appeals is under 28 U. S. C. § 1254 (1).[1]

Respondent was tried in Germany on January 9 and 14, 1947, before a general court-martial which had been appointed by order of the commanding general of the Continental Base Section, European Theatre, on December 7, 1946. The detail appointed was comprised of a trial judge advocate and two assistant trial judge advocates, defense counsel and two assistant defense counsel, the law member and twelve other officers. The ranking officer of the detail, a colonel of the Field Artillery with twenty-five years of commissioned service, was appointed law member. The only member of the detail appointed from the Judge Advocate General's Department was a captain who was designated an assistant trial judge advocate.[2] He was absent from respondent's trial on verbal orders of the commanding general.

The Court of Appeals determined that under these circumstances the court-martial had been appointed in disregard of the 8th Article of War, 41 Stat. 788, 10 U. S. C. § 1479. The relevant provision of this article

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[1] Respondent contends that this Court lacks jurisdiction to review a court of appeals' judgment ordering discharge of a prisoner or affirming such an order, in view of the omission from revised Title 28 of any provision comparable to former § 463c which expressly authorized review of such judgments on certiorari. We think this contention is without merit in view of the broad provision of § 1254 that "Cases in the courts of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case . . . ."

[2] The Court of Appeals stated in its opinion that two officers of the Judge Advocate General's Department were appointed to the detail. However, the record indicates that only one of those mentioned below was appointed from that department.

as in force at the time of respondent's trial is set forth in the margin.[3] The article was interpreted by the Court of Appeals as requiring, "certainly in times of peace, that the presence of a duly qualified law member from the Judge Advocate General's Department be made a jurisdictional prerequisite to the validity of such court-martial proceeding, except in the single instance where such officer is actually, and in fact, 'not available.'" 175 F. 2d at 276. The Court of Appeals held that the availability of a law member from the Judge Advocate General's Department was conclusively indicated by the order detailing an officer from that department in another capacity without any explanation. Thus the court concluded that the proceeding was void.

We are unable to agree with the Court of Appeals that this record discloses any disregard of the 8th Article of War in the appointment of the tribunal which convicted respondent.

Under the interpretation placed on the 8th Article by the court below, an officer from the Judge Advocate General's Department was "available" for appointment as law member if he was appointed on the detail in another capacity and nothing otherwise appeared to negative his availability as law member. The article has been construed differently by the Court of Appeals for the Second Circuit in *Henry* v. *Hodges,* 171 F. 2d 401 (1948). In

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[3] "The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. . . ." 41 Stat. 788, 10 U. S. C. § 1479. The 8th Article was amended substantially in 1948, 62 Stat. 628–629. See note 5, *infra.*

that case, in which the interpretative issue was similarly raised on petition for habeas corpus, one officer from the Judge Advocate General's Department had been appointed trial judge advocate and a second designated counsel for another accused. The court through Judge Learned Hand declared:

> "There remains the . . . question . . . whether any member of the Judge Advocate General's Department was 'available' at the time. We cannot say that it was not more in the interest of justice to detail Beatty to defend Feltman than to put him on the court; or that it was not better judgment to make Swan a prosecutor than a judge . . . . The whole question is especially one of discretion; and, if it is ever reviewable, certainly the record at bar is without evidence which would justify a review. The commanding officer who convenes the court must decide what membership will be least to the 'injury of the service,' and what officers are 'available.' 'Available' means more than presently 'accessible'; it demands a balance between the conflicting demands upon the service, and it must be determined on the spot." 171 F. 2d at 403.

We agree with the latter interpretation that the availability of an officer as law member was intended by Congress to be a matter within the sound discretion of the appointing authority. Ordinarily the "availability" of military personnel who are subject to assignment by an appointing authority is understood to depend upon a discretionary determination by the superior. *Cf. Kahn* v. *Anderson,* 255 U. S. 1 (1921); *Swaim* v. *United States,* 165 U. S. 553 (1897); *Mullan* v. *United States,* 140 U. S. 240 (1891); *Martin* v. *Mott,* 12 Wheat. 19 (1827). Moreover, the phrase adopted in the 8th Article, "available *for the purpose,*" expresses a clear intent that the concept of availability

should include the exercise of discretion by the appointing authority.[4]

The 8th Article has also been consistently interpreted and applied by the Army as vesting a discretion in the appointing authority, which when exercised is conclusive in determining not only the accessibility of personnel but also the suitability of the officer detailed as the law member of a general court-martial. CM 231963, *Hatteberg*, 18 B. R. 349, 366–369 (1943); CM ETO 804, *Ogletree*, 2 B. R. (ETO) 337, 346 (1943); CM 209988, *Cromwell*, 9 B. R. 169, 196 (1938); Digest of Opinions of The Judge Advocate General (1912–1940) § 365 (9). This established interpretation is entitled to great weight in our determination of the meaning of the article. *Cf. United States ex rel. Hirshberg* v. *Cooke*, 336 U. S. 210, 216 (1949).

The exercise of the discretion thus conferred on the appointing authority may be reviewed by the courts only if a gross abuse of that discretion would have given rise to a defect in the jurisdiction of the court-martial.[5] How-

[4] The relevant legislative history of the provision of the 8th Article relating to the law member supports this interpretation. Prior to the adoption of the 8th Article of War in 1920, military law did not provide for the service of a law member on a court-martial. Under the impetus for reform following World War I, the original draft of what became the 8th Article provided that every general court-martial should have a judge advocate whose duties were to be similar to those of the "law member," as finally provided for. The proposed Article would have provided further that such judge advocate of the court be a member of the Judge Advocate General's Department or an officer whose qualifications were approved by the Judge Advocate General. Hearings on S. 64, Subcommittee of the Senate Committee on Military Affairs, 66th Cong., 1st Sess., p. 5. The proposed Article was, however, abandoned for the provisions of the 8th Article. See 18 B. R. 349, 366–367 (1943).

[5] The 8th Article of War, as in force since February 1, 1949, expressly imposes as a jurisdictional requirement that the law member be an officer from the Judge Advocate General's Department or an officer whose qualification for such detail has been certified by the Judge Advocate General. 62 Stat. 628–629.

ever, we need not determine at this time whether the provision of the 8th Article relied upon below imposed a requirement going to the jurisdiction of the court-martial, for nothing in the record here involved indicates that the discretion of the appointing authority was improperly exercised. Clearly no abuse is disclosed by the appointment of an officer from the Judge Advocate General's Department to a capacity other than law member on the detail, or by reassignment of that officer to other duty at the time of trial, or by the standard of competence in legal matters shown by the law member at the trial.

The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process.[6] We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel. *Cf.*

[6] The following instances of error in the military proceedings were cited by the Court of Appeals:

"(1) Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.

"(2) Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.

"(3) The record reveals that the law member appointed was grossly incompetent.

"(4) There was no pre-trial investigation whatever upon the charge of murder.

"(5) The record shows that counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense.

"(6) The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law." 175 F. 2d at 277.

Humphrey v. *Smith,* 336 U. S. 695 (1949). It is well settled that "by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . . The single inquiry, the test, is jurisdiction." *In re Grimley,* 137 U. S. 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision. *In re Yamashita,* 327 U. S. 1, 8–9 (1946); *Swaim* v. *United States, supra,* 165 U. S. at 562.

It results that the judgment is

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BURTON, concurring.

I concur on the ground that the clause in the 8th Article of War, which deals with the availability of an officer of the Judge Advocate General's Department and is here at issue, is purely directory, and not jurisdictional. The 8th Article, in any event, calls for the appointment as the law member of a general court-martial of an officer meeting certain specifications. He must be either an officer of the Judge Advocate General's Department or he must be selected by the appointing authority as specially qualified for his duties. The unavailability of an officer of the Judge Advocate General's Department merely opens the field of eligibility to other branches of the service.

It may be assumed that, when the general court-martial involved in this case was appointed, it was a jurisdictional requirement that there be a law member appointed to it. It also may be assumed that it was a jurisdictional

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requirement that, if the appointing authority determined that no officer of the Judge Advocate General's Department was then *"available for the purpose,"* such authority was restricted to the appointment of "an officer of some other branch of the service selected by [him] . . . *as specially qualified to perform the duties of law member.*" (Emphasis supplied.) If the officer who was appointed met neither requirement, it may be assumed that the court-martial would have been without jurisdiction. If, however, as in this case, it is not questioned that the law member met the second requirement, I believe that we should not permit a review here of the discretion used by the appointing authority in determining the preliminary administrative question of whether or not an officer of the Judge Advocate General's Department was "available for the purpose." We should not permit it, even if it is alleged that the appointing authority's discretion in this regard was grossly abused. That detail was a matter within his administrative responsibility and should not be available as a basis for collateral attack upon the jurisdiction of an otherwise qualified and competent general court-martial.

REIDER v. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 403. Argued February 7, 1950.—Decided March 13, 1950.

Respondent railroad received goods at New Orleans, La., for transportation to Boston, Mass., by way of its line and connecting carriers, and issued its original through bill of lading for the shipment. Petitioner sued respondent for damages under the Carmack Amendment, 49 U. S. C. § 20 (11), alleging that petitioner was the lawful holder of the bill of lading and owner of the goods, that the shipment was in good order and condition when received by respondent at New Orleans, and that it arrived at Boston damaged. *Held:*

1. The Carmack Amendment was applicable to the shipment, and petitioner stated a claim against respondent upon which relief could be granted. Pp. 115–119.

2. The fact that the shipment originated in a foreign country, and that the goods were transported to New Orleans on an ocean bill of lading, did not render the Carmack Amendment inapplicable, since there was no through bill of lading from the foreign country to Boston and the foreign portion of the journey terminated at New Orleans. Pp. 117–119.

3. With respect to this transaction, respondent was the receiving carrier within the wording and meaning of the Carmack Amendment. P. 119.

176 F. 2d 13, reversed.

Petitioner's suit against respondent for damages under the Carmack Amendment, 49 U. S. C. § 20 (11), was dismissed by the District Court for failure to state a claim upon which relief could be granted. The Court of Appeals affirmed. 176 F. 2d 13. This Court granted certiorari. 338 U. S. 890. *Reversed,* p. 119.

Eberhard P. Deutsch argued the cause for petitioner. With him on the brief was *Malcolm W. Monroe.*

M. Truman Woodward, Jr. argued the cause for respondent. With him on the brief were *Thomas T. Railey, Fred G. Hudson, Jr., Robert E. Milling, Jr.* and *Elizabeth Ridnour Haak.*

MR. JUSTICE MINTON delivered the opinion of the Court.

The question in this case is whether a claim for relief under the so-called Carmack Amendment to the Interstate Commerce Act has been stated against respondent carrier. The District Court held that a claim within the Amendment had not been stated. The Court of Appeals for the Fifth Circuit affirmed by a divided court. 176 F. 2d 13. Because the case presents an issue of importance in the application of a federal statute governing liability of common carriers for damage to goods transported by them, we granted certiorari. 338 U. S. 890.

The Carmack Amendment in pertinent part provides:

> "Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading . . . ." 34 Stat. 593, 595, as amended, 49 U. S. C. § 20 (11).

Respondent railroad received a shipment of wool and skins at New Orleans, Louisiana, for transportation to Boston, Massachusetts, by way of its line and connecting carriers, and issued its original through bill of lading for the shipment. Petitioner, who alleged that he was the lawful holder of the bill of lading and owner of the goods, sued respondent, as receiving carrier under the Carmack Amendment, for damages, asserting that the shipment was in good order and condition when received by respondent at New Orleans and was damaged on arrival in Boston. Respondent filed a motion to dismiss on the ground that the complaint did not state a claim against respondent upon which relief could be granted. The Court of Appeals affirmed the District Court's order granting this motion and dismissing the suit.

It is not disputed that if these were all the facts in the case the courts below were in error. Clearly respondent is a common carrier subject to the Act, and a claim for relief against respondent, as receiving carrier, on account of damage to a shipment of goods moving from a point in one state to a point in another state was pleaded under the Carmack Amendment. See *Galveston, H. & S. A. R. Co.* v. *Wallace,* 223 U. S. 481. But from a stipulation filed in the District Court and considered with the pleadings, we learn that the shipment originated in Buenos Aires, Argentina. The goods were transported by steamship from there to New Orleans on an ocean bill of lading, freight for which was payable at Buenos Aires. What is stipulated to be an accurate English translation of the ocean bill of lading reads in part:

> "The SHIPPER, SHIP, CONSIGNEE, DESTINATION AND GOODS which are specified in this bill of lading are the following:
> SHIPPER: Emilio Rosler S. R. L. SHIP: RIO PARANA
> . . . . .
> PORT OF SHIPMENT: Buenos Aires

PORT OF DISCHARGE OF THE SHIP New Orleans
destination of the goods: _____ (if the goods are to be transshipped out of the port of discharge)
SHIPPER TO THE ORDER OF: The First National Bank of Boston
Notice of arrival should be addressed to (if consigned to Shipper's Order) Rudolf Reider 39 South Street Boston Mass. U.S.A."

The domestic bill of lading issued by respondent at New Orleans recited that the goods were received from H. P. Lambert Co. and consigned to the same H. P. Lambert Co. at Boston. The Court of Appeals characterized this railroad bill as a "supplemental bill of lading" issued by the domestic carrier to cover its portion of the transportation and delivery of a "through foreign shipment," and held that the Carmack Amendment was not intended to apply to such a foreign shipment. The tests laid down in *United States* v. *Erie R. Co.*, 280 U. S. 98, and *Texas & New Orleans R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, were applied by the Court of Appeals in determining that the transaction was a "through foreign shipment." And *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341, was relied on as authority for the proposition that the Carmack Amendment was not intended to apply to such a shipment.

Reliance on the cited cases is misplaced. The issue in the *Porter* case, *supra*, was totally different from the question here.[1] And whether the commerce is properly

[1] The Court there briefly alluded to the coverage of the Carmack Amendment. But the sole issue in the *Porter* case was whether federal regulation of bills of lading had covered the field to the exclusion of state regulation of the same subject matter. The Court's discussion of the Carmack Amendment there does not control our decision in this case.

characterized as foreign or domestic is, in our view of the case, not material.

The issue is whether this transaction is within the Carmack Amendment. But basically, the problem here is one of liability. The contract giving rise to liability—the bill of lading—is our primary aid in solving that problem. So we turn to the contract to ascertain whether it evidences a transaction within the Carmack Amendment.

Does the fact that the shipment in this case originated in a foreign country take it without the Carmack Amendment? We think not. There was no through bill of lading from Buenos Aires to Boston. The record does not show the slightest privity between respondent and the ocean carrier. The contract for ocean transportation terminated at New Orleans. Having terminated, nothing of it remained for the new, separate, and distinct domestic contract of carriage to "supplement." Even the parties to the ocean bill of lading and the domestic bill of lading were different. If the various parties dealing with this shipment separated the carriage into distinct portions by their contracts, it is not for courts judicially to meld the portions into something they are not. The test is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated. *Rice* v. *Oregon Short Line R. Co.*, 33 Idaho 565, 198 P. 161; *Barrett* v. *Northern Pacific R. Co.*, 29 Idaho 139, 157 P. 1016; *Baltimore & Ohio R. Co.* v. *Montgomery & Co.*, 19 Ga. App. 29, 90 S. E. 740. Thus it is not significant that the shipment in this case originated in a foreign country, since the foreign portion of the journey terminated at the border of the United States. The obligation as receiving carrier originated when respondent issued its original through bill of lading at New Orleans. That contract of carriage was squarely within the provisions of the statute.

The case of *Alwine* v. *Pennsylvania R. Co.*, 141 Pa. Super. 558, 15 A. 2d 507, much relied upon by respondent

and the Court of Appeals, is not in point. We need not now determine whether that case was correctly decided. For purposes of this case it is sufficient to note that there the Pennsylvania court emphasized that the shipment came into this country on a *through* bill of lading from Canada. The contract of carriage did not terminate at the border, as in the instant case. Nor does *Mexican Light & Power Co.* v. *Texas Mexican R. Co.*, 331 U. S. 731, aid respondent. There an export shipment on a through bill of lading from Pennsylvania to the international boundary, destined for a point in Mexico, was damaged in Mexico. The Texas Mexican Co., the last in a series of carriers handling the shipment in this country, issued a second bill of lading at Laredo, Texas, for the carriage on into Mexico. Recovery was sought against the Texas Mexican Co. as initial (receiving) carrier under the Carmack Amendment. This Court held that it was not a receiving carrier because its duties were controlled by the first bill, and the second bill was without consideration and void. As the dissenting judge below said: "That case rules nothing as to a reverse shipment . . . ." And it could hardly be contended that respondent's domestic bill of lading here was void. As a matter of fact, the shipment in this case could not have moved an inch beyond New Orleans under the ocean bill; and the Carmack Amendment required respondent to issue a through bill of lading for the carriage from New Orleans to Boston.

We disavow, as did both the concurring judge and the dissenting judge below, any intimation that our holding might impose liability on a domestic carrier for damage attributable to an ocean carrier. The complaint in this case alleges that the shipment was received by respondent in good order and condition and was damaged when delivered. Unless petitioner can prove the case stated by his complaint, respondent is not liable.

The purpose of the Carmack Amendment was to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods. To hold otherwise than we do would immunize from the beneficial provisions of the Amendment all shipments originating in a foreign country when reshipped via the very transportation chain with which the Amendment was most concerned. Respondent was the receiving carrier squarely within the wording and meaning of the Carmack Amendment. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, dissenting.

The problem presented by this case is whether a shipment which constitutes an organic transaction in commerce between a non-adjacent foreign country and the continental United States for every other aspect of the Interstate Commerce Act should be treated as such for purposes of § 20 (11) of that Act, familiarly known as the Carmack Amendment. 49 U. S. C. § 20 (11). Since I agree with the answer given by the Court of Appeals I ought not to join in reversing its decision.

That court's position is supported by this Court's view of the matter in *Missouri Pacific R. Co.* v. *Porter,* 273 U. S. 341, 344, 345, read in the light of the criteria for determining what constitutes a shipment in foreign commerce. See *United States* v. *Erie R. Co.,* 280 U. S. 98. To be sure, the precise question now here was not the issue in the *Porter* case. But what was there said as to the scope of the Carmack Amendment in relation to such commerce with a non-adjacent foreign country was relevant to the immediate question in the *Porter* case con-

sidered in its true aspect. In order to decide the precise question of that case the Court had to consider the regulatory scheme of liability under the Interstate Commerce Act in its entirety. The conclusion of the *Porter* case—that the Carmack Amendment does not apply to an unbroken transaction of commerce with a non-adjacent foreign country—carried the authority of the two Justices, Butler and Brandeis, who between them had had the most comprehensive experience with the working of the Interstate Commerce Act. As Judge Hutcheson indicated in his concurring opinion below, the answer to our problem is not to be had by taking words of the Carmack Amendment out of the illuminating context of the regulatory scheme of which they are a part. A legal faggot ought not to be broken into verbal sticks.

UNITED STATES *v.* COMMODITIES TRADING CORP. ET AL.

NO. 156. CERTIORARI TO THE COURT OF CLAIMS.*

Argued January 10–11, 1950.—Decided March 27, 1950.

In 1944 the War Department requisitioned a quantity of whole black pepper, as to which a ceiling price had been established by the Office of Price Administration under authority of the Emergency Price Control Act. In a suit by the owner to recover just compensation, the Court of Claims fixed as just compensation a price in excess of the ceiling price: *Held:* On the record in this case, the ceiling price of the pepper at the time it was requisitioned was the proper measure of just compensation. Pp. 122–131.

1. The congressional purpose and the necessities of a wartime economy require that ceiling prices be accepted as the measure of just compensation, so far as that can be done consistently with the objectives of the Fifth Amendment. Pp. 123–125.

2. Neither the Fifth Amendment nor the Emergency Price Control Act's provision that the Act shall not be construed to compel an owner to sell his property requires that, in determining the amount of just compensation, there be added to the ceiling price a "retention value"—*i. e.*, an allowance for the price the owner could have obtained had he been permitted to hold the commodity until after price restrictions had been removed. Pp. 125–128.

3. The owner failed to sustain the burden of proving special conditions and hardships peculiarly applicable to it; wherefore the ceiling price of the pepper, fair and just to the trade generally, must be accepted as the maximum measure of compensation for the taking. Pp. 128–131.

(a) The fact that the owner was an "investor" in pepper rather than a "trader" did not entitle it to "retention value," a value based on speculation concerning the price it might have obtained for pepper after the war and after price controls were removed. Pp. 128–129.

(b) The fact that the particular pepper delivered to the Government cost the owner more than the ceiling price is no basis

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*Together with No. 163, *Commodities Trading Corp. et al.* v. *United States,* also on certiorari to the same court.

for excepting the owner from application of the ceiling price as the proper measure of just compensation. Pp. 129–130.

(c) The Fifth Amendment does not require the Government to compensate an owner of requisitioned goods for potential profits lost because of war and the consequent price controls. P. 130.

113 Ct. Cl. 244, 83 F. Supp. 356, reversed.

In a suit to recover just compensation for a quantity of whole black pepper requisitioned in 1944 by the War Department, the Court of Claims awarded an amount in excess of the O. P. A. ceiling price but less than the amount claimed. 113 Ct. Cl. 244, 83 F. Supp. 356. This Court granted cross-petitions for certiorari. 338 U. S. 857. *Reversed and remanded,* p. 131.

Oscar H. Davis argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Melvin Richter.*

Edward L. Blackman argued the cause and filed a brief for Commodities Trading Corp. et al.

Mr. Justice Black delivered the opinion of the Court.

Commodities Trading Corporation brought this suit in the Court of Claims to recover "just compensation" for about 760,000 pounds of whole black pepper requisitioned by the War Department in 1944 from Commodities' stock of 17,000,000 pounds. The United States contended that the OPA ceiling price of 6.63 cents per pound was just compensation. Commodities denied this, claiming 22 cents per pound. It argued that Congress did not and could not constitutionally fix the ceiling price as a measure for determining what is just compensation under the Constitution. Commodities also contended that, for reasons peculiar to its own situation, application of the ceiling price in this instance would be particularly unjust. The Court of Claims fixed "just

compensation" at 15 cents per pound. In so doing, that court took into consideration what it terms "retention value," explained as an allowance for the price Commodities "undoubtedly could have secured for its pepper had it been permitted to hold it until after restrictions had been removed . . . ." The court also considered how much the precise pepper requisitioned cost Commodities, the prices at which that company sold pepper after the government requisition, subsequent OPA ceiling prices, and the average price of pepper for the past 75 years. 113 Ct. Cl. 244, 83 F. Supp. 356. We granted the petitions of both parties for certiorari. 338 U. S. 857.

First. The questions presented are controlled by the clause of the Fifth Amendment providing that private property shall not be "taken for public use, without just compensation." This Court has never attempted to prescribe a rigid rule for determining what is "just compensation" under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards.[1] Since the market value standard was developed in the context of a market largely free from government controls, prices rigidly fixed by law raise questions concerning whether a "market value" so fixed can be a measure of "just compensation." *United States* v. *Felin & Co.*, 334 U. S. 624. Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is "just" both to an owner whose property is taken and to the public that must pay the bill?

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[1] See, *e. g.*, *United States* v. *Miller*, 317 U. S. 369; *Olson* v. *United States*, 292 U. S. 246.

The word "just" in the Fifth Amendment evokes ideas of "fairness" and "equity," and these were the primary standards prescribed for ceiling prices under the Emergency Price Control Act.[2] As assurance that prices fixed under its authority by the administrative agency would be "generally fair and equitable," Congress provided that price regulations could be subjected to judicial review. All legitimate purchases and sales had to be made at or below ceiling prices. And most businessmen were compelled to sell because, for example, their goods were perishable or their businesses depended on continuous sales. Thus ceiling prices of commodities held for sale represented not only market value but in fact the only value that could be realized by most owners. Under these circumstances they cannot properly be ignored in deciding what is just compensation.

The extent to which ceiling prices should govern courts in such a decision is another matter. Congress did not expressly provide that prices fixed under the Price Control Act should constitute the measure of just compensation for property taken under the Fifth Amendment.[3] And § 4 (d) provides that the Act shall not be construed as requiring any person to sell. But § 1 (a) declared the Act's purposes "to assure that defense appropriations are not dissipated by excessive prices" and to "prevent hardships . . . to the Federal, State, and local governments, which would result from abnormal increases in prices . . . ." Congress thus plainly contemplated that these governments should be able to buy goods

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[2] 56 Stat. 23, 50 U. S. C. App. § 901.

[3] Had Congress prescribed a rule that prices fixed under the Act should constitute the measure of constitutional "just compensation," courts upon proper challenges would have been faced with responsibility of determining whether that rule satisfied the requirements of the Fifth Amendment. *Marbury* v. *Madison,* 1 Cranch 137. Compare *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327.

fulfilling their wartime needs at the prices fixed for other purchasers. The crucial importance of this in the congressional plan for a stabilized war economy to limit inflation and prevent profiteering is shown by the fact that during the war approximately one-half of the nation's output of goods and services went to federal, state and local governments.[4] And should judicial awards of just compensation be uniformly greater in amount than ceiling prices, expectations of pecuniary gains from condemnations might prompt many owners to withhold essential materials until the Government requisitioned them. We think the congressional purpose and the necessities of a wartime economy require that ceiling prices be accepted as the measure of just compensation, so far as that can be done consistently with the objectives of the Fifth Amendment.

Second. It is contended that acceptance of ceiling prices as just compensation would be inconsistent with the Fifth Amendment because such prices fail to take into account a factor designated by the Court of Claims as "retention value." This concept stems largely from the Emergency Price Control Act's provision that the Act shall not be construed as compelling an owner to sell his property against his will. Translating the provision as conferring on an owner the "right to hold his property until he can get for it whatever anyone is willing to pay," the Court of Claims held that it gave rise to a "retention value" which must be added to the ceiling price in order to meet the constitutional requirement of "just compensation." [5]

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[4] Eighth Report of the Director of War Mobilization and Reconversion, October 1, 1946, H. R. Doc. No. 45, 80th Cong., 1st Sess. p. 7.

[5] Pertinent parts of the Court of Claims discussion of "retention value" were:

"We have several times held that, in determining just compensation, we must take into account the plaintiff's right to hold its property until restrictions on its disposition are removed. *Seven-Up Bottling*

In enacting that provision Congress merely refused to take from owners their long-existing "right to hold" until they wanted to sell. It did not create a new "right to hold" as against a constitutional Government taking, or engraft added values of any kind on property which happens to be requisitioned at a time when prices are fixed by law. We cannot justifiably stretch this provision into a command that the Government pay owners a "retention value" for property taken.

Nor can we construe the Fifth Amendment as supporting the Court of Claims "retention value" rule. In peacetime when prices are not fixed, the normal measure of just compensation has been current market value; retention value has never been treated as a separate and essential factor. True, current market value may sometimes be higher because a buyer anticipates future rises in prices. And exceptional circumstances can be conceived which would justify resort to evidential forecasts of potential future values in order to determine present market value. But the general constitutional rule declared and applied by the Court of Claims did not rest on exceptional circumstances.

A persuasive reason against the general rule declared by the Court of Claims is the highly speculative nature of proof to show possible future prices on which "retention value" must depend. In this case, for instance, no one

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Co. v. *United States,* 107 C. Cls. 402; *Kaiser* v. *United States,* 108 C. Cls. 47; *Adler Metal Products Co.* v. *United States,* 108 C. Cls. 102; *Pantex Pressing Machine Co.* v. *United States,* 108 C. Cls. 735.

"The Government in time of war has the undoubted right to say to the citizen, if you want to sell your property you must not sell it for more than a certain price; but the Government has no right to take the property and pay for it no more than this fixed price, unless that price justly compensates the owner, taking into consideration his right to hold his property until he can get for it whatever anyone is willing to pay." 113 Ct. Cl. 259–260, 83 F. Supp. 357.

knew how long the war would last nor how long economic conditions due to war might lead Congress to continue price-fixing legislation. Predictions on these subjects were guesses, not informed forecasts. And even if such predictions were reasonably certain, there remained other unknowns. How much more than the ceiling price would a speculative purchaser have paid for property at the time of seizure? To what extent, if at all, would the lifting of war controls raise prices above the controlled ceilings? And as of what date should future value be estimated? The Court of Claims opinion indicates how haphazard such calculations must be: its figure of 15 cents per pound appears to be a rough judicial compromise between the ceiling price and the 22 cents claimed, not a weighted average drawn from the varied assortment of doubtful factors considered by the court. Moreover, that figure seems completely divorced from the conjectured postwar price, a factor crucially significant in the court's "retention value" concept.

An equally forceful objection to the "retention value" rule is the discrimination it would breed. Only a limited group of owners could take advantage of the rule: those who have nonperishable products so essential for war purposes that refusal to sell would result in governmental requisition. And many of these would be financially unable to withhold their goods on such a gamble. Thus owners able to hold essential nonperishable goods until requisition would become a favored class at the expense of other owners not so fortunate. Moreover, even within that favored class the "retention value" rule would create discrimination against owners impelled by a sense of duty to sell their goods to the Government at ceiling prices without waiting for requisition. A premium would be placed on recalcitrance in time of war.

A rule so difficult to apply and leading to such discriminatory and unjust results cannot be required by

the Fifth Amendment's command for payment of "just compensation."

Third. While there is no constitutional obstacle to treating "generally fair and equitable" ceiling prices as the normal measure of just compensation for commodities held for sale, there must be room for special exceptions to such a general rule. For unfair hardship may be inflicted on a particular dealer by valid ceiling prices which are "generally" fair. *Bowles* v. *Willingham,* 321 U. S. 503, 516–518. But the ceiling price of pepper, fair and just to the trade generally, should be accepted as the maximum measure of compensation unless Commodities has sustained the burden of proving special conditions and hardships peculiarly applicable to it.[6] *Cf. Marion & Rye Valley R. Co.* v. *United States,* 270 U. S. 280, 285.

Commodities contends that it proved the existence of such conditions. It points to the statement of the Court of Claims that the "so-called 'retention value' is particularly applicable in this case" because Commodities was an "investor" in pepper rather than a "trader." The company accumulated its large supply at intervals during the 1933–1941 period, expecting to hold it to sell when the price went up. The court found that Commodities could reasonably expect this rise: the nature of production was such that periods of abundance and scarcity were bound to alternate, and during the preceding 75 years the price of pepper had shown marked fluctuations in fairly regular cycles. Most of Commodities' pepper was bought when prices were low. It is argued that as an "investor" Commodities should not be deprived of the

[6] Commodities had petitioned the Price Administrator in 1943 to amend the applicable regulation so as to permit higher prices for pepper by allowances for storage expenses. This petition was denied. Nothing in the record indicates that the Emergency Court of Appeals was ever asked to consider ceiling prices for pepper.

pecuniary benefits which future high prices would have afforded but for the Government's taking.

Under this state of facts the situation of Commodities differed only in degree, if at all, from that of myriad other commodity owners who quite naturally wished to hold their goods for higher prices. Postwar inflationary influences are common and generally expected. Price cycles, seasonal and otherwise, are also well-recognized economic phenomena. Doubtless owners of steel, textiles, foodstuffs, and other goods could produce evidence similar to that offered in regard to pepper to show cyclical fluctuations in their prices. Nor would there be much difficulty in showing that a great many owners had bought, produced, or manufactured their various merchandise with the idea of withholding from markets to await expected higher prices. Many lost anticipated profits due to price control or requisition. Sacrifices of this kind and others far greater are the lot of a people engaged in war. That a war calls for sacrifices is of course no reason why an unfair and disproportionate burden should be borne by Commodities. But the facts here show no such burden on Commodities. Commodities, just like other traders in pepper and other products, bought pepper with the intention of ultimately selling on the market. No more than any other owner is Commodities entitled to "retention value," a value based on speculation concerning the price it might have obtained for pepper after the war and after price controls were removed.

Another contention is that the particular pepper turned over to the Government cost Commodities more than the ceiling price, and that this is a special circumstance sufficient to preclude use of the ceiling price here. The Court of Claims did find that the average cost to Commodities of the precise pepper taken, including labor costs, storage, interest, insurance, taxes and other ex-

penses, was 12.7 cents per pound. The Government challenges these findings and also claims that Commodities selected its high-cost pepper for delivery under the requisition. Pointing out that pepper is fungible and that the only relevant cost figure is the average cost to Commodities of all its pepper, the Government asserts that this average cost was less than the ceiling price.

We do not consider these contentions of the Government because we think that the cost of the pepper delivered provides no sufficient basis for specially excluding Commodities from application of the ceiling price. The general rule has been that the Government pays current market value for property taken, the price which could be obtained in a negotiated sale, whether the property had cost the owner more or less than that price. *Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340. The reasons underlying the rule in cases where no government-controlled prices are involved also support its application where value is measured by a ceiling price. In neither instance should the Government be required to make good any losses caused by the fact that the owner purchased goods at a price higher than market value on the date of taking. Especially is this true where the resulting loophole in wartime regulation would be available only to dealers in essential nonperishable commodities who have enough funds and storage space to withhold goods until the Government is forced to requisition them.

We have considered all other contentions of Commodities and find that none of them present reasons sufficient to justify awarding Commodities an amount in excess of ceiling prices. In the final analysis all its arguments rest on the principle that the Government must pay Commodities for potential profits lost because of war and the consequent price controls. We cannot hold that the Fifth Amendment requires the Government to give owners of requisitioned goods such a special benefit.

The judgment of the Court of Claims is reversed and the cause is remanded with directions to enter an appropriate judgment based on the maximum ceiling price of the pepper at the time it was taken.

It is so ordered.

MR. CHIEF JUSTICE VINSON and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, dissenting in part.

In 1933 Commodities Trading Corporation began to accumulate an inventory of black pepper, not as a trader in pepper but as an investor in a nonperishable commodity. It based this investment policy on the fairly regular cyclical fluctuations of pepper prices over a period of about seventy-five years. This regularity was due to the fact that pepper plantings in Sumatra, French Indo-China and India, which supplied almost all of it, fluctuated with the price of pepper in the world market. Neglect of their crops by the native growers in periods of depressed prices lowered supply; thereby prices were raised and this in turn stimulated new plantings. Since it takes the pepper plant about four years to bear, prices would normally maintain their high level for about that period. The operations of Commodities were based on the expectation that it would profitably adjust the sale of its holdings to the cyclical movement.

By 1938 Commodities had accumulated 25,000,000 pounds; by December, 1941, it had disposed of about 8,000,000 pounds. The rest it withheld from the market until the requisition here in controversy was made by the War Department, in May, 1944. December, 1941, is a significant date because a ceiling price on pepper was then established. The price at which it was pegged—6.75 cents per pound, amended shortly thereafter to 6.50 cents plus limited carrying charges—approximated the

market price at the time the free market in pepper came to an end. This free market price was responsive to the then unusually large inventory of pepper in the country, amounting to from 78,000,000 to 100,000,000 pounds, a three-year supply. The Government forbade importation of high-priced pepper from India, and the other sources of supply were cut off by the Japanese invasion. As a result, stocks rapidly declined, the fall being accelerated after the imposition of ceiling prices by a desire on the part of many importers to avoid additional carrying charges. By September, 1943, only about 28,000,000 pounds were in the hands of importers. Of this Commodities held, as we have seen, 17,000,000. From about the middle of 1942 activity had steadily shrunk and by early 1944 pepper was not for sale.

In May, 1944, the War Department requisitioned from Commodities about 760,000 pounds of black pepper. Commodities rejected the Government's offer of compensation at the ceiling price and this suit to recover "just compensation" followed.

On the basis of its "special findings of fact" the Court of Claims held that the ceiling price was not the measure of just compensation for the requisitioned pepper. It deemed the right to withhold from sale nonperishable goods until after price control terminated a value of substance to be included in ascertaining just compensation. The inclusion of this "retention value" in the present circumstances was especially appropriate, so the Court of Claims reasoned, because Commodities was not a trader but a long-term investor. After the controls were removed in 1946, pepper sold at 50 to 60 cents a pound and upward and the Court of Claims deemed these free market values relevant in determining the just compensation for the pepper requisitioned in 1944. In giving an award above the ceiling price, that court was further influenced by the fact that the cost of the pepper it attributed to

Commodities—12.7 cents per pound—exceeded the ceiling. Taking all the factors it deemed relevant into account, 15 cents per pound was found by that court to be just compensation for the pepper taking.

I. The "just compensation" required by the Bill of Rights when "private property [is] taken for public use" has a way of attracting far-flung contentions. So here, extreme positions are taken regarding the relevance of ceiling prices to "just compensation." On the one hand it is urged that ceiling prices are to be treated as though they represent value determined by a free market. On the other hand it is insisted that since it would be unjust for the Government itself to fix the compensation for what it takes, ceiling prices should be ignored. I agree with what I understand to be the Court's view in rejecting both these absolutes.

War conditions drastically change the economic environment in which a free market has its justification. The purpose of government controls is to terminate such a distorted free market. Since ceiling prices are required by law to be "generally fair and equitable" [1] and govern voluntary sales of property, they are not irrelevant in assessing just compensation. The value of private property is not immutable; especially is it not immune from the consequences of governmental policies. In the exercise of its constitutional powers, Congress by general enactments may in diverse ways cause even appreciable pecuniary loss without compensation. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . When [the diminution] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain

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[1] Emergency Price Control Act § 2 (a), 56 Stat. 24, 50 U. S. C. App. § 902 (a).

and compensation to sustain the act. So the question depends upon the particular facts." *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 413. See also *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355; *Pipe Line Cases,* 234 U. S. 548, 561; *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31.

It does not follow that controlled prices automatically meet the requirements for just compensation in the forcible taking of property simply because they replaced free market prices which could no longer be relied on to reflect the normal play of free economic forces. A system of price controls which is "generally fair and equitable" may give rise to individual instances of hardship in the requisitioning of property no matter how conscientiously and competently administered. See *Bowles* v. *Willingham,* 321 U. S. 503, 516–18. The hardship may reach such magnitude in an individual instance as to make a taking by the public at a ceiling price unjust compensation. Of course war means burdens, and there is no calculus by which they can be fairly distributed. From any point of view the ultimate sacrifices are uncompensable. But these considerations are not relevant in carrying out the Fifth Amendment. When there is a taking of property for public use, whether in war or in peace, the burden of the taking is the community's burden. The owner should be requited by that which satisfies prevailing standards of justice. This limitation upon the power of eminent domain has throughout our history been left for judicial application. We would be faced with a new problem had Congress specified that the ceiling prices should be the limit of just compensation. Such a statute would call for the usual respect to be accorded to the judgment of Congress in passing on the validity of legislation when the power of Congress to legislate is limited by broad standards and not by restrictions almost technical in their nature. We are relieved from a considera-

tion of any such question because Congress chose not to make ceiling price the measure of "just compensation." It is therefore an inescapable judicial duty to explore the elements relevant to just compensation even for the taking of property which, as to voluntary transactions, is subject to price control. The standard of just compensation is not mechanically to be replaced by ceiling prices.

It takes us some distance neither wholly to accept nor wholly to reject price ceilings as just compensation. The complications introduced by the displacement of free market prices by controlled prices serve to intensify the usual wariness against undue generalizations in ascertaining the value of specific property taken for public purposes. Cautious empiricism is the most promising attitude in dealing with problems of this sort. This means hugging as closely as possible the shore of the circumstances of the particular case.

On the present record only two issues need to be faced. In arriving at just compensation did the Court of Claims properly take into account (1) a "retention value" and (2) the cost of the pepper to Commodities.

II. The Court of Claims appears to have recognized as a component of just compensation the right of a property owner to withhold his property for some future opportunity of enhanced realization, even though he be in the same boat with all other owners for whom the ceiling price is a fair measure. In its bearing upon our immediate problem, recognition of such a "retention value" as part of the contemporaneous value of what was taken would have required the power to "divine prophetically" the war's end and the lifting of controls by Congress as well as the state of the pepper market thereafter. This is "to exact gifts that mankind does not possess." *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 223, 224. To allow such wild imagination to enter into the practical determination of what is just

compensation would merely sanction unbridled drafts on the Treasury. It would encourage every property owner to hold his goods off the market and to force the Government to requisition rather than purchase. That, by such retention, profits might be realized in the distant future is not an interest which the Constitution protects.

The diffused loss of profit throughout the nation's economy must be borne as a part of the common lot. Of a different order of loss would be a taking of the pepper at ceiling prices, if the ceiling price was far below the cost of the pepper to Commodities and such cost was incurred in the normal course of long-term holding operations. This might present a situation whereby the owner of the requisitioned property would be asked to bear more than its fair share of the just economic burden of the war.

III. The Court of Claims found that the cost to Commodities of the requisitioned pepper was 12.7 cents per pound compared with the ceiling price of 6.5 cents. The Government challenges the cost figures. It points out that Commodities kept its cost records on the basis of specific bags of pepper, each bag being recorded at its invoice cost and the applicable carrying charges. Commodities selected the bags of pepper delivered to the Government. Apparently it chose the bags which had the highest invoice cost and the greatest carrying charges, the pepper bought in 1933–1936. Assuming that costs higher than ceiling prices may affect just compensation, the Court of Claims should have considered whether the high cost of the pepper turned over to the Government was due to Commodities' accounting system. Since pepper is fungible and does not have age value, for all that appears Commodities' method of computing costs may have been unfair to the Government. "Just compensation" is not a function of a seller's theory of accounting.

The Court's opinion, however, holds that whatever the costs they are irrelevant in assessing just compensation.

Thereby the Court disregards in the concrete the principle which it avows in the abstract—namely, that ceiling prices are not to be deemed as though they were values arrived at in a free market and that individual instances of hardship may properly receive individual consideration. The Court urges that high costs would be irrelevant in peacetime when an uncontrolled market determines value. Compare *Vogelstein & Co.* v. *United States,* 262 U. S. 337. But a controlled market is not an uncontrolled market. Only by treating a controlled market as the equivalent of an uncontrolled market can ceiling prices be made the equivalent of market value and thereby the measure of just compensation.

Since "just compensation" is not easily reduced to quantitative determination, the price which is arrived at through the haggling of the market is the accepted norm in determining just compensation. The law sensibly recognizes that market price reflects fair dealing by men who are freely engaged in it. But the psychological basis for the norm is gone when the area of fair dealing is eliminated. The replacement of the free jostling of the desires of buyers and sellers by government edict is no doubt due to the realization that under the abnormal circumstances of war a free market in the sense of being uncontrolled is not a fair market. But such price regulation is the imposition of the will of outsiders and not the distillation of freely directed wills guided by self-interest. The norm of price fixing by government is thus very different from the usual price fixing by free exchange. Governmental price fixing carries its own valid titles for respect by the courts. But it does not carry that title of self-determination, as it were, which is implied by a free market price. Want of a free market value does not require us to embrace automatically the ceiling price in disregard of other relevant circumstances bearing on justice in a particular case.

Costs, unlike "retention value," do not yield inherently speculative results. Including costs in computing just compensation does not give the condemnee a "war profit" nor make inroads on the system of price controls. Such inclusion is a safeguard against discriminating hardships resulting from a formula which is generally fair but which by its nature cannot be fair to each individual. By the terms of the Price Control Act the only standard which Congress laid down for price fixing was that the ceiling price be "generally fair and equitable." The Act itself made no provision for individual relief from the general price. The administrative discretion for enforcing the Act vested in the Price Administrator no doubt authorized him to qualify the prices he fixed by procedure for individual relief therefrom. As to many commodities the maximum price schedules did include such provisions. The price regulation regarding the pepper requisitioned from Commodities contained no such provision. There was no way, therefore, by which Commodities could have had relief from any unfairness of the maximum price affecting its pepper by reason of the high cost which, on the basis of legitimate business considerations, it paid.

It is significant that Congress provided in § 4 (d) of the Emergency Price Control Act that "Nothing in this Act shall be construed to require any person to sell any commodity . . . ." 56 Stat. 28, 50 U. S. C. App. § 904 (d). This protective provision is peculiarly applicable to sellers who had acquired nonperishable property by way of reasonable investment at costs above the ceiling price. Under § 4 (d) they were not required to take a loss. But today's decision withdraws that statutory protection from those subjected to the exercise of the Government's power of condemnation. It may be that, despite § 4 (d), certain sellers with high costs would have had to sell in the private market because of economic factors. There is considerable difference, however, be-

tween hardships resulting from the impersonal workings of a general regulation and the personal operation of the power of eminent domain, under which Government officials have complete discretion to select the individual who shall give up his property at a loss for the public good.

We need not decide whether costs exceeding the ceiling price are always relevant to just compensation or the extent to which they may qualify the ceiling price. It is enough to hold that, if Commodities' costs, fairly measured, were greater than the ceiling price for pepper, it is fair to take them into account. We are not dealing here with a hoarder or with one who bought property at recklessly high costs in the expectation that, in any event, the Government would reimburse him. Commodities did not suddenly shift from "seller" to "holder" upon imposition of controls in 1941; while it reduced its total stocks between 1938 and 1941, the Court of Claims found that it was essentially a "holder" from 1933 on. Nor did Commodities make substantial sales to private persons at the ceiling price, and hold out against the Government. It merely exercised its statutory right to refuse to sell, a decision ethically justified if by selling it would incur an honest loss.

IV. The error of the Court of Claims in applying the doctrine of "retention value" requires reversal of its judgment. That court should reexamine Commodities' costs and if, under a fair accounting theory, those costs prove to be higher than ceiling, they should be considered in the computation of just compensation.

MR. JUSTICE JACKSON, dissenting.

When Congress enacted the Emergency Price Control Act, it provided that "Nothing in this Act shall be construed to require any person to sell any commodity . . . ." 56 Stat. 28, § 4 (d), 50 U. S. C App. § 904 (d). Of course, Congress did not thereby surrender the Government's

right to requisition any goods it might want under the usual eminent domain powers and for "just compensation." Why then this provision?

It seems obvious that the purpose was to avoid just what the Court does today—making ceiling prices for voluntary sales the measure of compensation for compulsory sales. This separation was not made as a favor to profiteers. In *United States* v. *Felin & Co.*, 334 U. S. 624, 650, writing in dissent for MR. JUSTICE DOUGLAS and myself, I set forth considerations which weighed heavily upon those proponents of price controls who wanted the controls to operate smoothly and expeditiously and also to avoid constitutional litigation, or at least adverse decisions. I said there:

> "It is hard to see how just compensation can be the legal equivalent of a controlled price, unless a controlled price is also always required to equal just compensation. It never has been held that in regulating a commodity price the Government is bound to fix one that is adequately compensatory in the constitutional sense, so long as the owner is free to keep his property or to put it on the market as he chooses. If the Government were required to do so, the task of price regulation would be considerably, if not disastrously, complicated and retarded. It seems quite indispensable to the Government itself, for the long-range success of price controls, that fixed prices for voluntary sales be not identified with the just compensation due under the Constitution to one who is compelled to part with his property." 334 U. S. at 651.

The Court today nullifies the congressional policy that no one is compelled to sell under the Act by using the condemnation power to compel the sale and this Act to fix the price. It also makes the constitutional provision for just compensation meaningless, since the Govern-

ment may first fix the price, as if no sales were compelled, and then compel the sales at the prices so fixed. I think the constitutional power to fix prices for voluntary sale in interstate commerce is much less confined than the power to fix prices for taking property. But hereafter, the price fixed may have to be tested by whether it would be just compensation for a compulsory sale.

I agree that the court below erred in its theory of "retention value." It did so by making the same basic error this Court is making: that of combining two separate systems—price fixing and condemnation. It considered that because the Emergency Price Control Act said a claimant was not required to sell under the Act, he might retain his property for some future rise in market. But it is not that Act which makes him sell. It is under the power of eminent domain that the Government expropriates this pepper. And under that power he has no right of delay and hence no retention value. He must part with his property on demand, and the issue is what is just compensation at that time.

At the time of this expropriation there was, insofar as market prices were concerned, a controlled market in the United States—controlled by the Government that was doing the expropriating. There was also a world market, with far higher market prices, to which the Government would have had recourse had not these parties earlier imported a large supply. Moreover, while the ceiling price on whole pepper was kept at a low figure, the price on ground pepper to the public showed what seems to be an unaccountably large spread. The problem of combining all relevant considerations that go to a valuation is a difficult one.

I concur in the reversal but would return the case for redetermination of the value at the date of requisition without allowance for "retention value." I should not direct that the ceiling price be used as the sole measure of just compensation.

RAILWAY LABOR EXECUTIVES' ASSOCIATION *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 337. Argued February 14, 1950.—Decided March 27, 1950.

1. The Interstate Commerce Commission, in approving a consolidation of railroad facilities under § 5 (2) (f) of the Interstate Commerce Act, has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order. Pp. 143–155.
2. An order of the Interstate Commerce Commission, effective May 17, 1948, approving a consolidation of railroad facilities incident to the construction of a passenger terminal at New Orleans, required the construction to commence by December 31, 1948 (later extended to December 31, 1949), and to be completed by December 31, 1953 (later extended to December 31, 1954). It contained detailed provisions for the compensatory protection of employees affected by the consolidation; but all such protection was to end by May 17, 1952. Many employees affected by the consolidation would not be displaced until the completion of the project, and therefore would receive no compensatory protection. *Held:* Neither such discrimination nor such insubstantial "protection" is consistent with the purpose and history of § 5 (2) (f) of the Interstate Commerce Act. Pp. 143–155.
3. While the Commission's interpretation of § 5 (2) (f) as limiting employee protection to a maximum of four years from the effective date of the order is entitled to weight, its decisions relied upon here were made in cases in which the adverse effects of the approved transactions were to be felt by the employees long before the expiration of such four years, and those decisions are not persuasive in the present case. Pp. 154–155.

84 F. Supp. 178, reversed.

In a suit to set aside part of an order of the Interstate Commerce Commission, a three-judge District Court granted defendants' motions for summary judgment and dismissed the complaint. 84 F. Supp. 178. On direct appeal to this Court, *reversed and remanded,* p. 155.

Edward J. Hickey, Jr. argued the cause for appellant. With him on the brief was *Clarence M. Mulholland.*

Daniel W. Knowlton argued the cause and filed a brief for the Interstate Commerce Commission, appellee.

W. S. Macgill argued the cause for the intervening railroads, appellees. With him on the brief were *Henry B. Curtis, Harry McCall* and *Henry L. Walker.*

Solicitor General Perlman, Assistant Attorney General Bergson, Robert L. Stern and *Richard E. Guggenheim* submitted on brief for the United States, appellee.

MR. JUSTICE BURTON delivered the opinion of the Court.

We are called upon to decide whether the Interstate Commerce Commission, in approving a consolidation of railroad facilities under § 5 (2) (f) of the Interstate Commerce Act,[1] has the power to extend the period of protection of the interests of the railroad employees beyond four years from the effective date of the order. For the reasons hereafter stated, we hold that the Commission has that power.

In 1947, the City of New Orleans, Louisiana, and several common carriers by railroad, all appellees herein, filed with the Interstate Commerce Commission a joint application for authority to construct, acquire and jointly own or use certain lines of railroad, as well as to abandon certain other lines or operations, as incidents to the construction of a passenger terminal at New Orleans. The Railway Labor Executives' Association, appellant herein, intervened as a representative of the interests of the employees of the railroads. Division 4 of the Commission entered a report and order, effective May 17, 1948,

[1] 54 Stat. 906–907, 49 U. S. C. § 5 (2) (f).

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approving and authorizing the transactions. *New Orleans Union Passenger Terminal Case,* 267 I. C. C. 763, and see *Oklahoma R. Co. Trustees Abandonment,* 257 I. C. C. 177, 197–201.

The order required the construction of the proposed lines to commence by December 31, 1948 (later extended to December 31, 1949), and to be completed by December 31, 1953 (later extended to December 31, 1954). It contained detailed provisions for the compensatory protection of employees affected by the consolidation, but all such protection was to end by May 17, 1952. The order disclosed that many employees affected by the consolidation would not be displaced until the completion of the project and that, therefore, they would receive no compensatory protection.[2]

After unsuccessfully seeking reconsideration and modification of the order by the full Commission, the appellant sued the United States (see 28 U. S. C. § 2322), in the District Court for the District of Columbia, asking that court to set aside that part of the Commission's order which limited the period of protection to four years. The Commission and the railroads intervened, answers

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[2] "The total number of employees on the New Orleans lines that probably would be affected . . . has been estimated . . . at 1,022, and the number required to operate and maintain the union passenger terminal has been estimated at 680. As provided in the terminal agreement, so far as feasible the terminal manager will recruit the necessary personnel from supervisory and other employees displaced at the 5 separate stations to be abandoned on completion of the union passenger terminal. The estimates indicate a net displacement of about 350 employees, of whom 9 are bridge tenders and about 108 are crossing watchmen now employed on tracks which will be retired or over which train and yard movements will be reduced; but the opinion is expressed that the number eventually displaced will not exceed 300." *New Orleans Union Passenger Terminal Case,* 267 I. C. C. 763, 777–778.

were filed and, no facts being in dispute, all parties sought a summary judgment. The case was heard by a three-judge District Court (see 28 U. S. C. §§ 1336, 2325 and 2284) which granted the defendants' motions for summary judgment and dismissed the complaint. 84 F. Supp. 178. The case is here on direct appeal. 28 U. S. C. §§ 1253 and 2101 (b).

Section 5 (2) (f) of the Interstate Commerce Act provides:

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 54 Stat. 906–907, 49 U. S. C. § 5 (2) (f).

The appellant and the United States[3] contend that the first sentence of § 5 (2) (f) requires the Commission to condition its approval upon a fair and equitable arrangement to protect the interests of railroad employees affected by this consolidation. They contend also that the second sentence prescribes a minimum of protection but does not restrict the Commission's power, under the first sentence, to prescribe further protection if such protection is deemed necessary to make the arrangement fair and equitable to the employees. The Commission, on the other hand, argues that the second sentence sets an inflexible standard for the fair and equitable arrangement required by the first sentence. The Commission concludes, therefore, that, in this case, it has power to require only such an arrangement as will prevent the affected employees from being in a worse position with respect to their employment for a maximum period of four years from the effective date of the order approving the project.[4]

Before the Transportation Act of 1940 brought § 5 (2) (f) into the Interstate Commerce Act, there was no statutory provision specifically requiring the protection

[3] Although in the District Court the United States supported the Commission, it has here filed a brief supporting the appellant.

[4] "As the record shows definitely that employees will be affected adversely by the applicants' proposals, it is appropriate in this case that we require a fair and equitable arrangement to protect the interests of employees so affected. We think that the benefit of such an arrangement necessarily must extend to all the railroad employees affected by exercise of the authorizations herein granted. But we also think that the fair and equitable arrangement contemplated by section 5 (2) (f) is measured by the specification therein of a protective period of 4 years from the effective date of our order approving a transaction within the scope of section 5 (2). As was decided in *Chicago, M., St. P. & P. R. Co. Trustees Construction, supra* [257 I. C. C. 292], we have no authority to prescribe any other period." *New Orleans Union Passenger Terminal Case*, 267 I. C. C. 763, 782.

of employees affected by consolidations of railroad facilities. The precursor of this provision was § 5 (4) (b), as amended by the Emergency Railroad Transportation Act of 1933. That section authorized the Commission to approve consolidations "upon the terms and conditions . . . found to be just and reasonable." [5] There was, however, a widespread awareness in the railroad industry that many of the economies to be gained from consolidations or abandonments could be realized only at the expense of displaced railroad labor. The interests of such employees were recognized in the Washington Job Protective Agreement of 1936.[6] This was a collective bargaining contract approved by about 85% of the railroad carriers and 20 of the 21 railroad brotherhoods. It contained a schedule of substantial financial benefits recommended for employees adversely affected by consolidations or so-called "coordinations." [7]

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[5] ". . . If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, . . . will promote the public interest, it may enter an order approving and authorizing such consolidation, . . . upon the terms and conditions and with the modifications so found to be just and reasonable." 48 Stat. 217.

[6] The agreement is published in the Hearings held by the House Committee on Interstate and Foreign Commerce on H. R. 2531, 76th Cong., 1st Sess. 231–241 (1939).

[7] George M. Harrison, President of the Railway Labor Executives' Association, recommended the enactment of the substance of the proposals of the Washington Agreement into law, so that the Commission might be able to make use of those proposals where appropriate. Those proposals included compensatory relief for employees, dating from the taking effect of a "coordination." As applied to a particular employee, the Agreement stated that the taking effect of a coordination "means the date in said period when that employee is first adversely affected as a result of said coordination." *Id.* at p. 232. It prescribed rates of compensation for employees deprived of their employment, for those continued in service but displaced from their former positions, and for those required to move to new

Section 5 (4) (b) and the Washington Agreement were both in effect when, in 1939, this Court held that the Commission had power to prescribe terms and conditions comparable to those in the Washington Agreement. *United States* v. *Lowden,* 308 U. S. 225. The Commission's requirement, in that case, of a protective period of five years was sustained. Thus, at the time of the enactment of § 5 (2) (f), the Commission already had power to determine and prescribe just and reasonable terms and conditions to protect employees affected by consolidations.[8]

The legislative history of § 5 (2) (f) shows that one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations. In 1938, the President appointed a Committee of Six to consider the transportation problem and recommend legislation.[9] It was composed equally of representatives of railroad management and railroad labor.

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places of residence, etc. It related individual protective periods to prior lengths of service. In some instances, it limited relief to five years from the effective date of the coordination.

[8] It was estimated that the compensatory relief at issue in *United States* v. *Lowden, supra,* would consume, in five years, $290,000 out of the $500,000 of contemplated savings to result to the railroads. Shortly before that decision, Congress approved, in the bill still pending before it, the language which was to become the first sentence of § 5 (2) (f). This Court said of such approval: "We think the only effect of this action was to give legislative emphasis to a policy and a practice already recognized by § 5 (4) (b) by making the practice mandatory instead of discretionary, as it had been under the earlier act." *Id.* at p. 239. See also, *Interstate Commerce Commission* v. *Railway Labor Executives Assn.,* 315 U. S. 373, 379.

[9] Letter of December 23, 1938, transmitting a report to the President from a Committee appointed by him September 20, 1938, to consider the transportation problem and recommend legislation. Hearings before the Senate Committee on Interstate Commerce on S. 1310, 2016, 1869 and 2009, 76th Cong., 1st Sess. 3–5 (1939). See also, H. R. Doc. No. 583, 75th Cong., 3d Sess. 1 (1938), as to the earlier Committee of Three appointed for the same purpose.

They endorsed the Washington Agreement and recommended amending § 5 of the Interstate Commerce Act so as to include the following:

> "After the details of any proposed consolidation have been determined by the interests involved, they should be embodied in an application for approval, addressed to the Transportation Board. In passing upon such an application, the Board should be governed by the following considerations:
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> . . . . .
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> "(*d*) The interests of the employees affected. The Board shall examine into the probable results of the proposed consolidation and require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employees." [10]

March 30, 1939, Senators Wheeler and Truman introduced S. 2009, which, in § 49 (3) (c), contained substantially the above language:

> "The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected." [11]

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[10] Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 2531, 76th Cong., 1st Sess. 275 (1939). And see supporting testimony of George M. Harrison at pp. 216–217. The Committee recommended vesting the protective power in a Transportation Board, for which the Interstate Commerce Commission was later substituted.

[11] As this provision was derived from the recommendation of the Committee of Six, the testimony of George M. Harrison, a member of that Committee, throws light upon its meaning. He said:

"In the report of the Committee of Six we do not undertake to lay down the specific, detailed protection that should be accorded labor by the Commission, but we were much of the opinion that in prescribing the protection the Commission would undoubtedly follow what seems to be generally the practice; and that is represented in an agreement that now exists between substantially all of the rail-

In the meantime, the House of Representatives considered a comparable bill, H. R. 4862, introduced by Representative Lea. Extended hearings were held. On the issue before us, this bill contained the same language as did the Senate bill. It required, as a prerequisite to the Commission's approval, "a fair and equitable arrangement to protect the interests of the employees affected." [12] When S. 2009 reached the House, the Committee in charge of it struck out everything after the enacting clause, substituted the text of the House bill and recommended its passage. In it, the provision in question took the form of an amendment to § 5 of the Interstate Commerce Act.

If this provision, which later became the first sentence of § 5 (2) (f), now stood alone as it did then, the Commission unquestionably would have power to grant at least as much relief to employees as it had under § 5 (4) (b). The crucial question is whether the second sentence of § 5 (2) (f), which was inserted soon thereafter, amounts not only to an additional provision for the protection of labor, but also to a limitation upon the discretion vested in the Commission by the first sentence.

The second sentence of § 5 (2) (f) has a significant history of its own. On the floor of the House, Representative Harrington suggested the following proviso to follow the first sentence:

> "*Provided, however,* That no such transaction shall be approved by the Commission if such transac-

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roads and all of the employees' labor unions. It provides a schedule of benefits and protections." Hearings before the Senate Committee on Interstate Commerce on S. 1310, 2016, 1869 and 2009, 76th Cong., 1st Sess. 34 (1938).

[12] H. R. Rep. No. 1217, 76th Cong., 1st Sess. 12 (1939), and see Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 2531, 76th Cong., 1st Sess. 184, 193–194, 214, 260 (1939).

> tion will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." [13]

The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related.

With the Harrington Amendment in it the bill went to conference.[14] It came out with all provisions relating to consolidations under § 5 eliminated. The House, however, recommitted the bill to conference with instructions

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[13] 84 Cong. Rec. Pt. 9, 9882 (1939).

This proposal was not without precedent. In the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, there were many temporary provisions which originally were to expire in 1934 and finally did expire in 1936. Among these was § 7 (b). It provided that no employee was to be deprived of employment or be in a worse position with respect to his job by reason of any action taken pursuant to the authority conferred by the Act. That provision, on a temporary and independent basis, thus coexisted with the permanent amendments which were then made to § 5 of the Interstate Commerce Act, including § 5 (4) (b).

[14] While the bill was in conference, the Legislative Committee of the Interstate Commerce Commission sent a communication to Congress condemning the principle of the amendment and upholding the sufficiency of the first sentence of § 5 (2) (f):

"As for the [Harrington] proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement' of 1936 between the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees." Interstate Commerce Commission Report on S. 2009, Omnibus Transportation Legislation, p. 67 (76th Cong., 3d Sess., House Committee Print), transmitted January 29, 1940.

to insert a modified form of the first sentence of § 5 (2) (f), together with a modified form of the Harrington Amendment. The modification of the first sentence merely extended the original language as to fair and equitable arrangements so as to include abandonments as well as consolidations.[15] The modification of the Harrington Amendment is not now material.

The second conference reported § 5 (2) (f) in the final form in which it was enacted into law. It retained the first sentence in its original language.[16] In the second

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[15] "(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. . . ." 86 Cong. Rec. Pt. 6, 5886 (1940).

[16] See H. R. Rep. No. 2832, 76th Cong., 3d Sess. 68–69 (1940), and remarks by Representative Lea, Chairman of House Conferees, 86 Cong. Rec. Pt. 6, 10178 (1940), and of Representative Wolverton at p. 10189.

The Commission's powers as to abandonments are thus left to § 1 (18)–(20), to which the Harrington Amendment has no possible application. They are as follows:

"(18) . . . no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

. . . . . .

"(20) The Commission shall have power to issue such certificate . . . and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. . . ." 41 Stat. 477–478, 49 U. S. C. § 1 (18) and (20).

Under § 1 (18) and (20), the Commission has authority, in its sound discretion, to prescribe the period and the conditions of the protection needed by employees adversely affected by abandonments. See *Interstate Commerce Commission* v. *Railway Labor Executives*

sentence, however, it included a substantial change in the Harrington proposal. It limited it to the four years following the effective date of the Commission's order of approval. It provided also that in each case the protective period was not to exceed the length of each employee's employment by a carrier prior to the effective date of the Commission's order of approval. This clause emphasized the separability of the second sentence, for it provided that "the protection afforded to any employee pursuant *to this sentence* shall not be *required* to continue for a longer period, . . ." than that prescribed. (Emphasis supplied. See p. 145, *supra,* for full text of the clause.)

The second sentence thus gave a limited scope to the Harrington Amendment and made it workable by putting a time limit upon its otherwise prohibitory effect. There was no comparable need for such a restriction upon the first sentence. We find, therefore, that the time limit in the second sentence now applies to it and to it alone. As thus limited, that sentence adds a new

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Assn., 315 U. S. 373. In that case, this Court reversed the narrow interpretation which had been given by the Commission to § 1 (20) in *Chicago G. W. R. Co. Trackage,* 207 I. C. C. 315, 322. The Commission had held that it was without authority to prescribe conditions for the protection of the interests of the displaced employees. Both the District Court of the District of Columbia and this Court recognized that the authority granted by § 1 (18)–(20) might be narrower than that applicable to consolidations under § 5 (4) (b) (see *United States* v. *Lowden,* 308 U. S. 225) but held, nevertheless, that it gave the Commission authority to protect the employees affected. Under the restrictive interpretation which the Commission seeks to apply to its power in the instant case, it would be prohibited from applying its full discretion to employees displaced by consolidations, at the same time that it is authorized to apply its full discretion to those displaced by abandonments. See *Interstate Commerce Commission* v. *Railway Labor Executives Assn.,* 315 U. S. 373. This distinction would be peculiarly discriminatory in the instant case where the consolidation includes many abandonments.

guaranty of protection for the interests of employees, without restricting the Commission's power to require greater protection as part of a fair and equitable arrangement. This serves the purpose of the sentence to increase, rather than to decrease, the protective effect of the paragraph.

Under the Commission's order in the instant case, employees displaced through the early elimination of grade crossings or otherwise may receive compensatory protection up to May 17, 1952, but employees displaced after that date will receive none. They will have had long notice that, by 1954, they may be displaced. But that much "protection" against the adverse effects of the consolidation would have been available to them without § 5 (2) (f). Neither such discrimination nor such insubstantial "protection" is consistent with the purpose or the history of the provision.

The Commission's interpretation of this statute, although entitled to weight, is not persuasive. Its present view of its authority is out of harmony with its broad view of its authority under § 5 (4) (b), approved in *United States* v. *Lowden, supra.* It also is inconsistent with the broad construction given by this Court to § 1 (18)–(20) as to abandonments. *Interstate Commerce Commission* v. *Railway Labor Executives Assn.,* 315 U. S. 373. The Commission's own decisions under § 5 (2) (f), relied upon here, have been made in cases in which the adverse effects of the approved transactions were to be felt by the employees long before the expiration of four years from the effective date of the order of approval.[17] For example, in *Chicago, M., St. P. & P. R. Co. Trustees Construction,* 257 I. C. C. 292, which is principally relied

[17] *Chicago, B. & Q. R. Co. Abandonment,* 257 I. C. C. 700; *Chicago, M., St. P. & P. R. Co. Trustees Construction,* 257 I. C. C. 292; *Oklahoma R. Co. Trustees Abandonment,* 257 I. C. C. 177, 196–202; *Texas & P. R. Co. Operation,* 247 I. C. C. 285, 295, 296.

upon by the Commission, the construction originally was required to be completed December 31, 1943, and that date was extended to December 31, 1944, but the effective date of the order of approval was April 26, 1942, so that the minimum protective period of four years did not expire until 1946. In that case, the Commission did not eliminate all compensatory protection as it has for many employees here.

We conclude, therefore, that the Commission, while required to observe the provisions of the second sentence of § 5 (2) (f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation.

The judgment of the District Court is reversed and the case is remanded to that court with directions to remand it to the Interstate Commerce Commission for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE JACKSON dissents upon the ground that resort to legislative history to vary the terms of the statute is not justified in this case.

MR. CHIEF JUSTICE VINSON and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED joins, dissenting.

The sole question before us is the proper construction to be given to the amendment made to § 5 (2) (f) of the Interstate Commerce Act by the Act of September 18, 1940, 54 Stat. 898, 906–07. The District Court agreed

with the construction given to the provision by the Interstate Commerce Commission. In the court below, but not here, the Department of Justice joined the Interstate Commerce Commission in urging this construction upon that court. I do not think the arguments which the Government urged below have been adequately answered, and I therefore yield to them. I cannot do better than state them in the Government's own language:

> "The section contains the clear and precise provision that the four-year period shall commence from the effective date of the order of approval. Had Congress intended that the period shall run from the date when the consolidation goes into effect or, as argued by plaintiff, from the date the employees are adversely affected, such words easily could and would have been used by Congress. Nor does the section give to the Commission discretion in applying a period other than four years from the effective date of the order of approval. The terminology in the statute is that the Commission *shall* include the four-year limitation therein provided. To provide a different period in the Commission's order would be contrary to the specific requirement imposed upon the Commission by the statute.
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> "Congress deliberately fixed the period of protection to start from the effective date of the order and not the date an employee is adversely affected.
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> . . . . .
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> "In the light of the clear unambiguous and specific language of Section 5 (2) (f), its consistent interpretation and application by the Commission, since its enactment and over a long period of years, and the legislative history of the statute, the order of the Commission herein should not be disturbed."

I would affirm the judgment of the District Court.

STANDARD-VACUUM OIL CO. v. UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 15. Argued October 13, 1949.—Decided March 27, 1950.

Petitioner sued in the Court of Claims to recover compensation for property in the Philippine Islands allegedly requisitioned by the United States for military purposes during the Japanese invasion of the Islands more than six years previously. The Government moved to dismiss the claims on the ground that they were barred by the six-year limitation prescribed by § 156 of the Judicial Code, now 28 U. S. C. § 2501. Petitioner contended that, during the Japanese occupation of the Islands, it was deprived of access to information bearing on the existence of its claims; but its pleadings contained no such allegations. The Court of Claims considered this contention but dismissed the claims. *Held:*

1. Since the question whether deprivation of access to information bearing on the existence of petitioner's claims during the Japanese occupation of the Philippine Islands could or would affect the operation of the six-year statute of limitations is not properly presented on the record, this Court will not consider it. Pp. 158–160.

2. Since the court below considered facts not stated in the pleadings and its opinion and judgment take cognizance of such facts, its judgment is vacated and the cause is remanded with discretion to permit further pleadings. Pp. 160–161.

3. If permission to plead further is denied, or if it is granted and petitioner fails to plead further, the cause shall be dismissed. P. 161.

112 Ct. Cl. 137, 80 F. Supp. 657, judgment vacated and cause remanded.

The Court of Claims dismissed petitioner's claim for compensation for property allegedly requisitioned by the United States. 112 Ct. Cl. 137. 80 F. Supp. 657. This Court granted certiorari. 336 U. S. 935. *Judgment vacated and cause remanded,* p. 161.

Albert R. Connelly argued the cause for petitioner. With him on the brief was *George S. Collins.*

Newell A. Clapp argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade.*

MR. JUSTICE MINTON delivered the opinion of the Court.

On December 5, 1947, petitioner filed suit in the Court of Claims to recover just compensation for certain of its properties in the Philippine Islands which the United States had allegedly requisitioned for military purposes. On March 24, 1948, petitioner filed an amended petition, including for the first time the claims here involved, the Seventh and the Fifteenth. A second amended petition was filed June 1, 1948. In the Seventh claim of the amended petition, petitioner alleged that the United States on or about December 18, 1941, requisitioned and took certain petroleum products and other personal and real property of petitioner located in the Philippine Islands. The Fifteenth claim of the amended petition contained an allegation, *inter alia,* that during the period from December 1941 to January 1942, respondent took and disbursed certain other petroleum products of petitioner located at another place in the Philippine Islands.[1] In the interim between the filing of the first and the second amended petitions, on April 12, 1948, the United States had filed a motion to dismiss the Seventh and Fifteenth claims on the ground that it appeared on the face of the amended petition that the claims sued upon each accrued more than six years prior to the filing of the amended petition, that the claims were therefore barred by § 156 of the Judicial Code,[2] and the Court of Claims was without jurisdiction to hear said claims. The

[1] This portion of the Fifteenth claim is hereafter referred to as the Fifteenth claim.

[2] "Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a

court allowed this motion to stand directed against the second amended petition. After hearing argument, the court sustained the motion to dismiss, and did dismiss the Seventh and Fifteenth claims. 112 Ct. Cl. 137, 80 F. Supp. 657. We granted certiorari (336 U. S. 935) on the assumption that the record presented the question whether deprivation of access to information bearing on the existence of petitioner's claims during the Japanese occupation of the Philippine Islands could or did affect the operation of the six-year statute. But since the record does not properly present that question, we cannot answer it.

The case reaches us upon pleadings that allege only the fact of taking in 1941 and 1942, more than six years before the Seventh and Fifteenth claims were filed by petitioner. We do not intimate that any facts could have the effect of relieving petitioner from the limitation of the statute, nor what facts should be alleged that could have that effect.

It might be assumed in favor of petitioner's pleadings what is judicially known, that the Japanese were, for all practical purposes, in complete control of the Philippine Islands by May 1942 and continued in control until sometime subsequent to October 1944, when the United States Army returned. But it cannot be assumed that petitioner was deprived of information about its property before and during that period. The pleadings do not so inform, and certainly a court could not know judicially the facts of petitioner's information or lack of information. Then there is the period from the United States reoccupation in 1945 to March 24, 1948. With respect to this period of United States control of the Islands, nothing is alleged by petitioner concerning its deprivation of or access to

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statement thereof is filed in the court . . . within six years after the claim first accrues . . . ." 36 Stat. 1139, 28 U. S. C. § 262, now 62 Stat. 976, 28 U. S. C. § 2501.

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information about the taking of its property at the times set forth in the claims.

True, the discussion of petitioner's claims seems to have been at large before the Court of Claims as to the information or lack of information petitioner had concerning its claims and as to the effect such information or lack thereof might have had upon petitioner's right to file the claims more than six years after they accrued. The majority opinion of the Court of Claims recites:

> "Plaintiff alleges that because of the loss and destruction of its records proper claims could not be filed until the Japanese occupation had ended and opportunity had to reconstruct statistically the properties, stocks, equipment, etc., owned by it at the time of requisitioning or destruction." 112 Ct. Cl. at 139, 80 F. Supp. at 658.

There are no such allegations in the amended petition. What allegations there are in the petition bring the case squarely within the statute, which denies the Court of Claims power to entertain an action brought more than six years after the action accrues.

Thus the case was decided not only upon what was alleged in the pleadings but upon other allegations as well, as to which no clear inkling appears in the record. Because the Court of Claims considered these additional allegations, it is urged that we should also consider them. But we cannot consider such allegations in determining the sufficiency of the cause stated. After all, pleadings and the making of a proper record have not been dispensed with. They still have a function to perform. This case points up that function. We will not review questions not clearly raised on the record.

Since it is apparent that facts were considered by both the Court of Claims and counsel that were not in the pleadings, and the court's opinion and judgment take

cognizance of such facts, the judgment is vacated and the cause is remanded. The Court of Claims may permit further pleadings if in the court's discretion such further pleadings seem proper and just. If permission to plead further is denied, or if petitioner fails to plead further should permission be granted, the cause shall be dismissed.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

DENNIS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 14. Argued November 7, 1949.—Decided March 27, 1950.

Petitioner, who is General Secretary of the Communist Party of the United States, was convicted in the District of Columbia of violating R. S. § 102, 2 U. S. C. § 192, by willfully failing to appear before the Committee on Un-American Activities of the House of Representatives in compliance with a subpoena duly served upon him. On *voir dire* examination, government employees on the jury panel were interrogated individually by petitioner's counsel as to whether the fact that petitioner was a Communist, the attitude of the Committee on Un-American Activities toward Communists, or the recently issued Executive Order 9835 providing standards for the discharge of government employees upon reasonable grounds for belief that they are disloyal to the Government, would prevent them from rendering a fair and impartial verdict. Seven government employees who gave negative answers to these questions and testified that they could render a fair and impartial verdict were permitted to serve on the jury. There was no proof of actual bias, and petitioner's challenge of these government employees for cause was denied. *Held:* In the circumstances of this case, petitioner was not denied the trial "by an impartial jury" guaranteed by the Sixth Amendment. Pp. 164–172.

(a) The enactment of D. C. Code (1940) § 11–1420, which removed (with specified exceptions) the previously existing disqualification of government employees for jury service in the District of Columbia in criminal and other cases to which the Government is a party, was within the power of Congress and, therefore, employees of the Federal Government are not challengeable solely by reason of their employment. *United States* v. *Wood*, 299 U. S. 123; *Frazier* v. *United States*, 335 U. S. 497. Pp. 165–167, 172.

(b) While impaneling a jury, the trial court has a serious duty to determine the question of actual bias and a broad discretion in its rulings on the challenges therefor; and it must be zealous to protect the rights of an accused, irrespective of his political or religious beliefs. P. 168.

(c) One of an unpopular minority group must be accorded that solicitude which properly accompanies an accused person; but he is not entitled to unusual protection or exception. P. 168.

(d) In order to secure the constitutional guarantee of trial by an impartial jury in the circumstances of this case, it is not necessary that all government employees be held to be biased as a matter of law. Pp. 168, 172.

(e) The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact; and preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury. Pp. 168, 171–172.

(f) Judicial notice may be taken of Executive Order 9835; but that does not justify an assumption by this Court that government employees could not serve fairly and impartially as jurors in the circumstances of this case—especially when they stated under oath that they could do so. Pp. 169–171.

(g) Nor, in the circumstance of this case, can an exception in favor of a Communist be carved out of the rule laid down in the statute and construed in *Wood* v. *United States* and *Frazier* v. *United States* that there is no implied bias by reason of government employment. P. 171.

(h) Nor can this Court, any more than the trial court, take judicial notice of a "miasma of fear" to which government employees are claimed to be peculiarly vulnerable and from which other citizens are by implication immune. P. 172.

84 U. S. App. D. C. 31, 171 F. 2d 986, affirmed.

Petitioner was convicted in the District of Columbia of violating R. S. § 102, 2 U. S. C. § 192. The Court of Appeals affirmed. 84 U. S. App. D. C. 31, 171 F. 2d 986. This Court granted certiorari. 337 U. S. 954. *Affirmed*, p. 172.

George W. Crockett, Jr. argued the cause for petitioner. With him on the brief were *Earl Dickerson, David M. Freedman* and *Harry Sacher.*

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Campbell, Robert S. Erdahl* and *Harold D. Cohen.*

Robert J. Silberstein filed a brief for the National Lawyers Guild, as *amicus curiae,* urging reversal.

MR. JUSTICE MINTON delivered the opinion of the Court.

The question we have for determination here is whether a challenge for cause to jurors on *voir dire* because of employment by the Federal Government should have been sustained under the circumstances of this case.

Petitioner was convicted of violating R. S. § 102, 2 U. S. C. § 192, for willfully failing to appear before the Committee on Un-American Activities of the House of Representatives in compliance with a subpoena duly served upon him. The Court of Appeals affirmed, 84 U. S. App. D. C. 31, 171 F. 2d 986. We granted certiorari limited to the question whether Government employees could properly serve on the jury which tried petitioner. 337 U. S. 954.

Petitioner voluntarily appeared before the House Committee on Un-American Activities which had under consideration two bills to outlaw the Communist Party. Petitioner was and is General Secretary of the Communist Party of the United States. On his voluntary appearance before the Committee, petitioner refused to answer questions as to his name and the date and place of his birth. The Chairman of the Committee directed that a subpoena be served forthwith upon petitioner, requiring him to appear before the Committee on April 9, 1947. On the appointed date petitioner sent a representative but did not appear in accordance with the subpoena. The Committee reported his refusal to appear to the House of Representatives, and the House adopted a resolution certifying the report of the Committee to the United States Attorney for the District of Columbia. Petitioner was subsequently indicted.

When the case was called for trial, petitioner made a motion for transfer upon the ground that he could not obtain a fair and impartial trial in the District of Columbia. In his affidavit supporting the motion, he posited

this contention mainly on the ground that Government employees, who comprise a large part of the District's population, are subject to Executive Order 9835, 12 Fed. Reg. 1935, providing standards for their discharge upon reasonable grounds for belief that they are disloyal to the Government of the United States. He argued that Government employees would be afraid to risk the charge of disloyalty or possible termination of employment which would allegedly flow from a vote for acquittal. The motion for a transfer was denied.

Both sides conducted further *voir dire* examination at the conclusion of the court's questioning of the panel. Attorney for petitioner questioned individually each member of the panel who indicated that he was employed by the Government. He then challenged for cause all Government employees. The court denied the challenge. Petitioner exercised two of his three peremptory challenges against Government employees. He exhausted all his peremptory challenges. Seven of the twelve finally selected were Government employees. Each of the seven expressed the belief that he could render a fair and impartial verdict.

Is petitioner entitled to a new trial because his challenge to the Government employees for cause was not sustained? The question of the presence of Government employees on District of Columbia juries is not a new controversy. It has been before this Court on three previous occasions. *Crawford* v. *United States,* 212 U. S. 183; *United States* v. *Wood,* 299 U. S. 123; *Frazier* v. *United States,* 335 U. S. 497. In the *Crawford* case the defendants were charged with a conspiracy to defraud the United States. The Court held that the statute prescribing the eligibility of jurors in the District of Columbia did not control the subject. The Court turned to the common law in force in Maryland when the District was formed, and found that a servant was subject to challenge

for cause at common law where the master was party to the case on trial. In such a case, bias would be implied as a matter of law. The Court concluded that it was error to deny a challenge for cause to a Government employee in a case to which the Government was a party.

In 1935 Congress, prompted by the paucity of qualified jurors which resulted from the *Crawford* decision, passed an Act redefining eligibility for jury service in the District of Columbia. After exempting certain classes, the Act provided: "All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia . . . shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service . . . ." 49 Stat. 682, D. C. Code, § 11–1420 (1940).

The constitutionality of this Act was sustained in *United States* v. *Wood,* 299 U. S. 123, where the defendant was charged with petty larceny from a private corporation. The defendant contended that the presence of Government employees on the jury denied the right of trial by an impartial jury within the meaning of the Sixth Amendment to the Constitution of the United States. He pointed out that under the common law as expounded by Blackstone, a King's servant and therefore a Government employee could not serve on a jury, and he argued that this view was carried into the Sixth Amendment.

Chief Justice Hughes, speaking for the Court, meticulously examined the problem. He found that Blackstone's statement of disqualification had reference only to servants of private parties, and that there was no established practice with respect to the King's servants at common law. The Court was of the view that even if such a common law disqualification existed, Congress had power to remove it. Unlike the statute in the *Crawford* case, the 1935 Act left no doubt that Congress intended

to qualify Government employees as jurors. The constitutionality of such a declaration was presented for the first time. The opinion carefully emphasized that the Act left accused persons free to show the existence of actual bias. Only the question of implied bias was presented. The Court concluded that the guarantee of an impartial jury was not impaired, stating:

> "It is manifest that the Act was passed to meet a public need and that no interference with the actual impartiality of the jury was contemplated. The enactment itself is tantamount to a legislative declaration that the prior disqualification was artificial and not necessary to secure impartiality. . . . To impute bias as matter of law to the jurors in question here would be no more sensible than to impute bias to all storeowners and householders in cases of larceny or burglary." *United States* v. *Wood, supra,* 148–149, 150.

Only last term in *Frazier* v. *United States,* 335 U. S. 497, the problem of jury service by Government employees was reexamined. There the defendant was tried and convicted of violating the Narcotics Act by a jury of the District of Columbia composed entirely, due to circumstances fortuitous or otherwise, of Federal Government employees. Mr. Justice Rutledge, speaking for the Court, reexamined the rule of the *Wood* case that Government employees are not disqualified as a matter of law from serving on a jury in a case to which the Government is a party. Government employees were again held to be subject to challenge only for "actual bias."

It would be a work of supererogation to attempt to clarify the statement of the law after the *Wood* and *Frazier* cases. Some may doubt the wisdom of the Court's decision in laying down the rule, but there can be no doubt that this Court has spoken very clearly, not only once, but twice.

No question of actual bias is before us. The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact. In both the *Wood* and *Frazier* cases this Court stressed that while impaneling a jury the trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor. *United States* v. *Wood, supra,* 133–134, 150; *Frazier* v. *United States, supra,* 511–512. We reaffirm those principles. In exercising its discretion, the trial court must be zealous to protect the rights of an accused. And we agree that this the court must do without reference to an accused's political or religious beliefs, however such beliefs may be received by a predominant segment of our population. Ideological status is not an appropriate gauge of the high standard of justice toward which our courts may not be content only to strive. But while one of an unpopular minority group must be accorded that solicitude which properly accompanies an accused person, he is not entitled to unusual protection or exception.

Petitioner asserts that in order to secure the constitutional guarantee of trial by an impartial jury all Government employees must be held, in the special circumstances of this case, to be biased as a matter of law. It is not contended that bias appears as a fact from the record. As far as it appears, the court was willing to consider any evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal, but no such proof was made. Nor was there evidence with respect to the existence of a climate of opinion among Government employees that they would jeopardize their tenure or provoke investigation by such a verdict. Rather petitioner asks that bias be implied from the recitation of the following circumstances: He

is a Communist; the instigator of the charges is the Un-American Activities Committee which allegedly would take notice of a vote for acquittal; the issue in the case is contempt of Congress; in contempt cases the Government's interest is the vindication of a direct affront, as distinguished from its role in an ordinary prosecution. But petitioner primarily bases his case on a request, in effect, that judicial notice be taken of an aura of surveillance and intimidation which is said to exist in the District because of Executive Order 9835, outstanding at the time of the trial.

The "Loyalty Order," as it is popularly known, requires the investigation of all persons entering civilian employment with the United States; as to those already in service, heads of departments and agencies are charged with the duty of making certain that disloyal persons are not retained. Petitioner maintains that because of this Order, Government employees would be hesitant to vote for acquittal because such action might be interpreted as "sympathetic association" with Communism.

Of course, the Loyalty Order could be the subject of judicial notice. Such notice, however, would give only limited illumination. It is proper to observe that the Loyalty Order is not directed solely against Communists, and that the crime of which petitioner was convicted is not a crime peculiar to Communists. Further, the Loyalty Order preceded the instant trial only by about three months. It was promulgated by the President on March 21, 1947. This trial began on June 23, 1947, and was concluded on June 26, 1947. On May 9, 1947, the President submitted to Congress a request for an appropriation to carry out the Loyalty Order,[1] which was not

[1] H. R. Doc. No. 242, 80th Cong., 1st Sess. (1947); 93 Cong. Rec. 4977 (1947).

enacted into law until July 31, 1947.[2] It was not until August 18, 1947, that Standard Form 84, requesting certain pertinent information from each federal employee, was made available.[3]

The administrative implementation of Executive Order 9835, which was yet to come, was apparently not the subject of anticipatory fear by these jurors. Their answers to interrogatories on the influence of the Loyalty Order were categorically to the contrary.[4] We must credit these representations, and this is particularly so in the absence of any evidence which would indicate an opposite

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[2] 61 Stat. 696, 700. See Investigations Subcommittee on Expenditures, Investigation of Federal Employees Loyalty Program, S. Rep. No. 1775, 80th Cong., 2d Sess. (1948).

[3] Federal Personnel Manual I2–4. In a press release dated November 7, 1947, the Civil Service Commission announced the appointment of the Loyalty Review Board. A statement of the Board with respect to its regulations was published on January 20, 1948. 13 Fed. Reg. 253.

[4] "Mr. McCabe: You are familiar with the Government loyalty oath investigation?

"Juror Holford: I believe I am. I have heard something of it.

"Mr. McCabe: Do you feel that rendering a verdict of not guilty in this case, if you come to that conclusion, it would stop you, any criticism or embarrassment among your fellow employees?

"Juror Holford: None whatsoever.

"Mr. McCabe: Or by your superiors?

"Juror Holford: No.

"Mr. McCabe: You would not have any thought that would be taken as evidence of friendliness to communism?

"Juror Holford: No; I am not worried about my job that way."

. . . . .

"Mr. McCabe: Now, Mr. Jones, you have heard, have you, of the loyalty test or loyalty investigation which is going on to test the loyalty of Government employees? Have you heard of that?

"Mr. Jones: Yes, I have.

"Mr. McCabe: Are you aware of the fact that one of the tests that might disqualify or prevent you from Government employment

opinion among Government employees. One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.

Ultimately, petitioner's contentions amount to this: Since he is a Communist, in view of all the surrounding circumstances an exception must be carved out of the rule laid down in the statute, and construed in *Wood* and *Frazier,* that there is no implied bias by reason of Government employment. Thus the rule would apply to anyone but a Communist tried for contempt of a congressional committee, but not to a Communist. We think the rule in *Wood* and *Frazier* should be uniformly applied. A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible. The Act makes no exception for distinctive circumstances. It states that: "All . . . persons . . . whether employed in the service of the Government of the United States or of the District of Columbia . . . shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service . . . ." Preservation of the opportunity to prove

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is friendly association with any Communist person or any Communist organizations?

"Mr. JONES: That would not. I am a Civil Service employee. I have taken an examination for my job.

"Mr. MCCABE: Yes. Are you aware of the fact that, despite any Civil Service protection, still a finding that you were in friendly association with any Communist or Communist organization would render you ineligible to continue in your Government position?

"Mr. JONES: It would not.

"Mr. MCCABE: What?

"Mr. JONES: It would not."

The replies of the other jurors were in a similar vein.

actual bias is a guarantee of a defendant's right to an impartial jury. We adhere to our holding that the enactment of the statute is within the power of Congress, and that therefore employees of the Federal Government are not challengeable solely by reason of their employment.

It follows that we are unable to conclude that the failure to sustain the challenge for cause denied petitioner an "impartial jury." "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States* v. *Wood, supra,* 145–146. In this case, no more than the trial court can we without injustice take judicial notice of a miasma of fear to which Government employees are claimed to be peculiarly vulnerable—and from which other citizens are by implication immune. Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors, which duty this same Government has imposed upon them. There is no disclosure in this record that these jurors did not bring to bear, as is particularly the custom when personal liberty hinges on the determination, the sense of responsibility and the individual integrity by which men judge men.

The judgment is *Affirmed.*

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE REED concurs in the opinion and judgment of the Court. He reads the Court's decision to mean that Government employees may be barred for implied

bias when circumstances are properly brought to the court's attention which convince the court that Government employees would not be suitable jurors in a particular case. Absent such a showing, however, Government employees may not be barred from jury service merely because they are Government employees.

MR. JUSTICE JACKSON, concurring in the result.

In but two ways could the Court avoid affirming the conviction of Dennis. One is to rescind the general rule established in *Frazier* v. *United States,* 335 U. S. 497, that a jury is, in contemplation of law "impartial," even when entirely composed of government employees. The other is to retain, and thereby strengthen, that general rule but create a special exemption for Communists.

I adhere with increasing conviction to my dissent in *Frazier* v. *United States, supra* at 514. The Court there dug a pit dangerous for civil liberties. The right to fair trial is the right that stands guardian over all other rights. Reference to the reports will show what otherwise one would not believe: that the Court, by a bare majority, held it to be entirely fair to try a person before a jury consisting solely of government employees, plus the fact that one juror and the wife of another worked in the office of the department head responsible for enforcement of the law charged to be violated. The common instinct of men for fair dealing and the experience of trial lawyers alike reject this holding. Whenever any majority can be mustered to overrule that weird and misguided decision, I shall be one of it.

But the way for the Court to get out of the hole it fell into with *Frazier* is not to dig another and worse one. We are actually urged to hold that the kind of jury a defendant may have depends upon his political opinions or affiliations. The offense for which Dennis was tried was

contempt of a Committee of Congress. That is not an offense that touches the immediate security of the Nation. Nor does guilt or innocence depend upon defendant's political views or party membership. Of course, he is, and the jury was bound to learn that he is, a prominent figure in the Communist Party. But the same acts would be the same offense if he were an orthodox Democrat. The sole ground for creating an exemption from the *Frazier* rule is that the defendant is a Communist, and Communists are now exceedingly unpopular in Washington. I agree that this highlights the unfairness of the *Frazier* rule and provides reason for overruling it; but I do not agree that it justifies the proposed exception to that decision.

The *Frazier* doctrine was promulgated by a majority of the Court which well knew that its rule would apply to this type of case and in these times. That decision was handed down on December 20, 1948, with this present case just around the corner. Dennis had already been convicted and his conviction had been affirmed in highly publicized proceedings occurring only a few city blocks from us; and his petition for certiorari had been filed in this Court. The four of us dissenting in *Frazier* warned specifically that the Government in these times is using its power as never before to pry into lives and thoughts of government employees. All that is urged now is more of the same and there is nothing in this situation that should not have been within the contemplation of the Court when the *Frazier* case was decided the way it was. The proposal now is a partial repeal—for Communists only.

Courts should give to a Communist every right and advantage that they give to any defendant. But it is inconceivable that being a Communist can entitle a defendant to more. Let us picture the proposal in operation. Two defendants are brought to trial for contempt of Congress. One, a Communist, has defied the Un-

American Activities Committee. The other, a Republican, has defied the Committee investigating the State Department. Both make well-founded claims that the Executive branch of the Government is hostile to them; both ask to exclude its employees from the jury so they may be tried by persons under no obligation to their adversaries. The proposal is that the trial judge should grant the motion of the Communist and deny that of the Republican! What then becomes of equal justice under law?

It is true that Communists are the current phobia in Washington. But always, since I can remember, some group or other is being investigated and castigated here. At various times it has been Bundists and Germans, Japanese, lobbyists, tax evaders, oil men, utility men, bankers, brokers, labor leaders, Silver Shirts and Fascists. At times, usually after dramatic and publicized exposures, members of these groups have been brought to trial for some offense. I think that none of them at such times ever should be forced to defend themselves against the Government's accusations before the Government's employees. But so long as accused persons who are Republicans, Dixiecrats, Socialists, or Democrats must put up with such a jury, it will have to do for Communists.

MR. JUSTICE BLACK, dissenting.

The petitioner, Dennis, was convicted of wilfully refusing to give testimony before the House Committee on Un-American Activities. The evidence against him was exceptionally strong. But no matter how strong that evidence, he had a constitutional right to have it passed on by an impartial jury.[1] No juror can meet the test

[1] The Sixth Amendment provides that defendants charged with crimes in federal courts "shall enjoy the right to . . . trial, by an impartial jury." And see *Tumey* v. *Ohio,* 273 U. S. 510, 535: "No

of "impartiality" if he has good reason to fear that a vote for acquittal would subject him to harassing investigations and perhaps cost him his job. On this ground the government employees called for jury duty were challenged for cause by petitioner. I am convinced that denial of this challenge deprived Dennis of an impartial jury.

Although each juror asserted that he or she could vote for acquittal without fear of adverse consequences, that cannot be accepted as conclusive evidence of impartiality. The test of bias sufficient to exclude a juror for cause is not what the particular juror believes he could do. Long ago Chief Justice Marshall ruled that a person "may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the jury; because it suspects prejudice; because in general, persons in a similar situation, would feel prejudice." 1 Burr's Trial 414, 415, 25 Fed. Cas. 14,692g, at p. 50. And this Court, while recognizing that persons of the "highest honor and greatest self-sacrifice" would not be influenced by fear of financial losses, has said that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey* v. *Ohio,* 273 U. S. 510, 532.[2]

We did not depart from the "average man" test in *United States* v. *Wood,* 299 U. S. 123, or *Frazier* v. *United States,* 335 U. S. 497. Those cases involved convictions

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matter what the evidence was against him, he had the right to have an impartial judge." This case related to financial interests of a mayor trying defendants, but the principles there declared are equally applicable to jurors who must judge the guilt or innocence of a defendant.

[2] See note 1, *supra.*

for theft and dope-peddling. They did hold that proof of mere governmental employment was not enough, standing alone, automatically to impute disqualifying bias in every criminal proceeding brought by the Federal Government. But both opinions clearly indicated that "particular issues or circumstances" might require exclusion of government employees in order to assure an impartial jury.[3] In complete harmony with the principle declared in the *Burr* and *Tumey* cases, our *Wood* opinion cautioned that a government employee could be disqualified if "in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias . . . ."[4] 299 U. S. at 134. And the *Frazier* opinion emphasized that these factors would support disqualification of government employees for "actual bias" without proof of "prejudice in the subjective sense." 335 U. S. at 510–11, n. 19.

Special circumstances of the type supporting disqualification under these decisions are, in my judgment, clearly shown by this record. The difficulty of securing an impartial jury at all is revealed by the number of potential jurors who felt that Dennis's position as Secretary of the Communist Party in this country would alone prevent

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[3] In the *Frazier* case one juror and the wife of another were employed in the Department of Treasury, which was charged with enforcing the anti-narcotic laws. This Court did not decide whether such employment would distinguish these jurors from other government employees sufficiently to support a timely challenge, because the only special challenge raising this ground was belatedly made in a motion for new trial.

[4] The Court also stated that bias could not be imputed "simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases." 299 U. S. at 149.

their giving him a fair trial.[5] And the prevailing pattern of loyalty investigations and threatened purges makes it wholly unrealistic to expect government employees to enter the jury box with that quality of disinterestedness essential to complete impartiality.

The reasons urged for disqualifying government employees were first presented to the trial court in an affidavit supporting petitioner's motion for change of venue. The sworn allegations of that affidavit were never denied by the Government. In essence, the affidavit pointed out that all federal employees were under constant scrutiny by various agencies and congressional committees for possible sympathy with Communists or with affiliated organizations; that under Executive Order 9835, issued following vigorous demands by the congressional committee which had initiated the prosecution of Dennis, any of these employees would lose his job if a "loyalty test" revealed "reasonable grounds" for belief that he was disloyal; that members of the same committee had stated that anything less than imposition of maximum punishment on Dennis would expose the persons responsible therefor to charges of disloyal sympathy with Commu-

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[5] The difficulty of obtaining an impartial jury in cases where popular indignation is aroused became manifest during World War I. Judge Amidon, a veteran trier of Espionage Act cases, described his experiences as follows:

"For the first six months after June 15, 1917, I tried war cases before jurymen who were candid, sober, intelligent business men, whom I had known for thirty years, and who under ordinary circumstances would have had the highest respect for my declarations of law, but during that period they looked back into my eyes with the savagery of wild animals, saying by their manner, 'Away with this twiddling, let us get at him.' Men believed during that period that the only verdict in a war case, which could show loyalty, was a verdict of guilty." Quoted in Chafee, Free Speech in the United States 70 (1941 ed.).

nism; [6] and that consequently a vote for acquittal would jeopardize the job of any government employee so voting.[7] Petitioner again cited the "loyalty test" in challenging for cause all governmental employees called as jurors, although he did not bother to reargue the facts because his reasons were "clear to us all." Thus petitioner called the trial judge's attention to substantial facts in support of his challenges.

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[6] In this connection the affidavit asserted that committee members "have stated openly on the floor of the House of Representatives that they demand a prosecution and conviction of, and the imposition of the maximum punishment on this defendant. They have charged that anything less would open the persons responsible therefor to a charge of disloyalty, and sympathy to Communism."

In oral argument on the motion for change of venue and an accompanying motion for continuances, counsel elaborated on one facet of this charge by reading from the Congressional Record a colloquy between a member of the committee and other congressmen. The substance of the colloquy was that the Attorney General should be impeached unless he obtained quick trials of Dennis and others charged with contempt by the committee. 93 Cong. Rec. 3815–3816.

[7] The affidavit read in part: "The enormous consequences of the Executive Order referred to above make it absolutely impossible to secure a fair and impartial trial in the District of Columbia for a leader of the Communist Party, particularly when the charge against him is laid by the Committee on Un-American Activities. The finding of disloyalty involves not only discharge from employment but a permanent branding as a disloyal and undesirable person, endangering the possibility of earning a livelihood in the future. No individual can be expected lightly to take the risk of incurring such consequences to himself, his family and his associates. The meaning of 'sympathetic association' is undefined in the Executive Order and there is no assurance that it may not be construed by the Attorney General to include a recognition of the rights of a member of the Communist Party. And even if the Attorney General himself would not so construe it, it is impossible to assume that persons selected for jury duty will run the risk of a charge of sympathy with Communism flowing from voting for an acquittal of so prominent a leader of the Communist Party."

To say that employees of the United States could meet objective tests of complete impartiality in the trial of cases like this is to disregard human nature. Probably at no period of the nation's history has the "loyalty" of government employees been subjected to such constant scrutiny and investigation by so many government agents and secret informers. And for the past few years press and radio have been crowded with charges by responsible officials and others that the writings, friendships, or associations of some government employee have branded him "disloyal." Government employees have good reason to fear that an honest vote to acquit a Communist or anyone else accused of "subversive" beliefs, however flimsy the prosecution's evidence, might be considered a "disloyal" act which could easily cost them their job. That vote alone would in all probability evoke clamorous demands that he be publicly investigated or discharged outright; at the very least it would result in whisperings, suspicions, and a blemished reputation.

In the *Wood* case this Court regarded as "far-fetched and chimerical" the suggestion that no government employee could have voted for acquittal of theft without endangering his job. I agree. But under the circumstances here it seems equally "far-fetched and chimerical" to suggest that government employees, however convinced of innocence, would feel completely free to acquit a defendant charged with disobeying a command of the Committee on Un-American Activities. My belief is that no defendant charged with such an offense, whatever his political affiliation, should be forced to accept a government employee as a juror. Nor should the Government want such an unfair advantage. Of course this advantage makes convictions easier. That is precisely what the Sixth Amendment was designed to prevent. It com-

mands impartiality in the jury-box. Impartiality cannot survive in the shadow of threats to a juror's reputation and livelihood.

MR. JUSTICE FRANKFURTER, dissenting.

Acquiescence in a precedent does not require approval of its extension. Although I adhere to the views expressed by MR. JUSTICE JACKSON for the minority in *Frazier* v. *United States,* 335 U. S. 497, 514, I do not urge that it be overruled. But in abiding by it I need not assent to enlarging the areas of its undesirability. The constitutional command for trial by an "impartial jury" casts upon the judiciary the exercise of judgment in determining the circumstances which preclude that free, fearless and disinterested capacity in analyzing evidence which is indispensable if jurymen are to deal impartially with an accusation. The judgment that a court must thus exercise in finding "disqualification for bias" of persons who belong to a particular class is a psychological judgment. It is a judgment founded on human experience and not on technical learning. And so it does not follow that merely because government employees are not automatically disqualified as jurors in every prosecution in the District of Columbia they should not be disqualified in prosecutions that are deemed to concern the security of the nation.

The reason for disqualifying a whole class on the ground of bias is the law's recognition that if the circumstances of that class in the run of instances are likely to generate bias, consciously or unconsciously, it would be a hopeless endeavor to search out the impact of these circumstances on the mind and judgment of a particular individual. That is the reason why the influences of consanguinity or of financial interest are not individually canvassed. Law as a response to life recognizes the operation of such

influences even though not consciously or clearly entertained. The appearance of impartiality is an essential manifestation of its reality. This is the basic psychological reason why the Founders of this country gave the judiciary an unlimited tenure. Impartiality requires independence, and independence, the Framers realized, requires freedom from the effect of those "occasional ill-humors in the society," which as Alexander Hamilton put it in The Federalist are "the influence of particular conjunctures." The Federalist, No. 78 at 400 (Beloff ed. 1948).

One of the greatest of judges has assured us that "Judges are apt to be naif, simple-minded men." Holmes, Collected Legal Papers 295. Only naiveté could be unmindful of the force of the considerations set forth by MR. JUSTICE BLACK, and known of all men. There is a pervasiveness of atmosphere in Washington whereby forces are released in relation to jurors who may be deemed supporters of an accused under a cloud of disloyalty that are emotionally different from those which come into play in relation to jurors dealing with offenses which in their implications do not touch the security of the nation. Considering the situation in which men of power and influence find themselves through such alleged associations, it is asking more of human nature in ordinary government employees than history warrants to ask them to exercise that "uncommon portion of fortitude" which the Founders of this nation thought judges could exercise only if given a life tenure. The Federalist, *supra*.

A government employee ought not to be asked whether he would feel free to decide against the Government in cases that to the common understanding involve disloyalty to this country. Questions ought not to be put to prospective jurors that offer no fair choice for answer.

Men ought not to be asked in effect whether they are brave or wholly indifferent to the enveloping atmosphere. They should not be asked to confess that they are weaklings nor should it be assumed that they are fully conscious of all the pressures that may move them. They may not know what judges of considerable forensic experience know, that one cannot have confident knowledge of influences that may play and prey unconsciously upon judgment. See, *e. g.*, Mr. Justice Oliver in *Rex* v. *Davies,* [1945] 1 K. B. 435, 445. The well-known observations of Mr. Justice Holmes on these psychological influences are here pertinent: "This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." *Frank* v. *Mangum,* 237 U. S. 309, 345, 349. Nor is it irrelevant to note that we are living in a time when inroads have been made on the secrecy of the jury room so that, upon failure to agree, jurors are subjected to harassment to disclose their position in the jury room. Ought we to expose our administration of criminal justice to situations whereby federal employees must contemplate inquisitions into the manner in which they discharged their juror's oath?

To conclude that government employees are not disqualified in prosecutions inherently touching the security of the Government, at a time when public feeling on these matters is notoriously running high, because they are not *ipso facto* disqualified from sitting in a prosecution against a drug addict or a petty thief, is to say that things that are very different are the same. The doctrine of the *Frazier* case does not require such disregard of the relevant. To recognize the existence of what is characterized as a phobia against a particular group is not to discriminate in its favor. If a particular group, no matter what its beliefs,

is under pressure of popular hostility, exclusion of potential jurors peculiarly susceptible to such pressure is not an expression of regard for political opinions but recognition by law of the facts of life. It does not follow that because members of different but respected political parties can sit in judgment upon one another where punishment is involved, all members of such parties, no matter what their relation to an operating bias, can freely and fairly sit in judgment upon those belonging to an ostracized group.

Let there be no misunderstanding. To recognize the existence of a group whose views are feared and despised by the community at large does not even remotely imply any support of that group. To take appropriate measures in order to avert injustice even towards a member of a despised group is to enforce justice. It is not to play favorites. The boast of our criminal procedure is that it protects an accused, so far as legal procedure can, from a bias operating against such a group to which he belongs. This principle should be enforced whatever the tenets of the group—whether the old Locofocos or the Know-Nothings, the Ku Klux Klan or the Communists. This is not to coddle Communists but to respect our professions of equal justice to all. It was a wise man who said that there is no greater inequality than the equal treatment of unequals.

We are concerned with something far more important than sustaining a particular conviction. Many and conflicting are the criteria by which a society is to be deemed good, but perhaps no test is more revealing than the characteristics of its punitive justice. No single aspect of our society is more precious and more distinctive than that we seek to administer criminal justice according to morally fastidious standards. These reveal confidence in our institutions, respect for reason, and loyalty to our profes-

sions of fairness. The powerful claim in behalf of our civilization represented by our system of criminal justice will be vindicated and strengthened if those who in the popular mind appear to threaten the very existence of the Government are tried by citizens other than those in the immediate employ of the Government at the seat of Government.

UNITED STATES ET AL. *v.* UNITED STATES SMELTING REFINING & MINING CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.

No. 173. Argued February 13–14, 1950.—Decided March 27, 1950.

1. The Interstate Commerce Commission has the power under the Interstate Commerce Act to fix the point at which line-haul or carrier transportation service begins and ends. Pp. 190, 193, 197.
2. The convenient points at which line-haul or carrier transportation service begins and ends are questions of fact to be determined by the Commission; and its findings on those questions will not be disturbed by the courts if supported by substantial evidence. P. 193.
3. In this proceeding, the Commission's determination of the points at which line-haul or carrier transportation service begins and ends at the smelting companies' plants is supported by substantial evidence and must be sustained. Pp. 188–194.
4. When the Commission has determined the point at which line-haul or carrier transportation service begins and ends at a particular plant, the line-haul charge thereafter must be to that point and not to a further point fixed in a carrier tariff, since transportation to the latter point at the line-haul rate would be preferential and would violate § 6 (7) of the Interstate Commerce Act. Pp. 194–197.
5. The contention that to require the carriers to conform to the Commission's orders in this case would require the smelting companies to pay twice for their services misconceives the scope of this proceeding, which was solely to define what is embraced in line-haul transportation, and not to determine whether the charge made for the service was compensatory. Pp. 197–198.
6. The Commission has authority to exclude rate questions from this proceeding. P. 198.
7. The fact that there was no appeal from an earlier judgment of the District Court granting a temporary injunction and remanding the case to the Commission (the court having found that there was no evidence to sustain a Commission finding that the line-haul rates were not compensatory for the services rendered) does not

require that the judgment here appealed from be affirmed under the rule of "law of the case," since the earlier judgment was not a final judgment. Pp. 198–199.

Reversed.

In a suit to enjoin the enforcement of orders of the Interstate Commerce Commission, the District Court held the orders unlawful and permanently enjoined their enforcement. On direct appeal to this Court, *reversed,* p. 199.

Joseph W. Bishop, Jr. argued the cause for the United States, appellant. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson* and *J. Roger Wollenberg. Edward Dumbauld* was also of counsel.

Allen Crenshaw argued the cause for the Interstate Commerce Commission, appellant. With him on the brief was *Daniel W. Knowlton.*

Charles A. Horsky argued the cause for the United States Smelting Refining & Mining Co., appellee. With him on the brief was *Paul B. Cannon.*

Otis J. Gibson argued the cause and was on the brief for the Denver & Rio Grande Western Railroad Co., appellee.

Elmer B. Collins argued the cause and was on the brief for the Union Pacific Railroad Co., appellee.

John F. Finerty argued the cause and was on the brief for the American Smelting & Refining Co., appellee.

The cause was submitted on briefs by *Clinton D. Vernon,* Attorney General, for intervenors State of Utah et al.; *Walter R. McDonald* for intervenor Public Utilities Commission of Colorado; *Stanley T. Wallbank* for intervenor Colorado Mining Association; and *S. J. Quinney* for intervenor Utah Mining Association, appellees.

MR. JUSTICE MINTON delivered the opinion of the Court.

The Interstate Commerce Commission instituted the proceedings leading to the orders here involved as its Seventy-fifth and Seventy-sixth Supplemental Reports to *Ex parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services,* 209 I. C. C. 11. The proceedings concerned the switching and spotting services rendered by appellee-carriers at the Garfield and Murray, Utah, and Leadville, Colorado, plants of the American Smelting Company, and the Midvale, Utah, plant of the United States Smelting Company. Extensive hearings were held in these supplemental proceedings for the purpose of determining the respective points at which the carriers' line-haul transportation service ended and the extent of the service the carriers might render in the discharge of their obligation to deliver the freight at these four plants.

It will not be necessary to detail the physical characteristics of each of the plants involved here. Each has a receiving yard or interchange tracks upon which incoming and outgoing freight is switched. Beyond the interchange tracks switching services are numerous and extensive within the plants. The Garfield plant may be described as indicative of the situation at all the plants.[1] There, frozen ore is handled in six distinct movements. A large amount of intraplant switching is done by the carriers. To perform these switching services at Garfield requires three train-crew shifts daily. In one twelve-month period at this plant, 22,982 carloads of inbound and 6,960 carloads of outbound freight were handled.

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[1] The plants are described in detail by the Commission in its reports, 263 I. C. C. 749, 266 I. C. C. 476, 270 I. C. C. 385; 263 I. C. C. 719, 266 I. C. C. 349, 270 I. C. C. 359.

On October 14, 1946, the Commission entered its first orders in these proceedings, enjoining appellee-carriers from performing switching and spotting service in violation of the Interstate Commerce Act. On petition to the District Court, a statutory three-judge court sitting, the orders were held unlawful. The court was of the opinion that each of the Commission's orders was based on the premise that the line-haul rates did not cover the intraplant services, and held that such a finding was not supported by the evidence. In addition, the court found that the Commission had not "presumed to exercise the authority which is intended to be conferred under *Ex Parte 104* in that the order made is not specifically based upon that authority." The matter was remanded to the Commission "for such action as it may find justifiable in the premises," and the Commission was "temporarily enjoined from requiring its formal order to be carried into force and effect . . . ." The Commission on remand reopened the case but took no more evidence. It restated the ground for its action and entered cease and desist orders against the carriers. On petition of the appellees, the District Court again held the orders unlawful and permanently enjoined their enforcement. It is from this judgment that the Commission and the United States have appealed.

The Commission undertook its general investigation, *Ex parte 104,* in the interest of establishing a uniform and equal service for shippers. The Commission concluded that carrier obligation for transportation service ends customarily when delivery is made at a convenient point on the siding inside or outside a consignee's plant. This delivery is such as may be accomplished in one continuous movement without "interruption" occasioned for the convenience of the industry, and is only the equivalent of team track or simple placement switching. In the Commission's view as developed in *Ex parte 104,* such a con-

venient delivery point marks the beginning and end of what is termed "line-haul" transportation, and is the extent of the service which may be performed under the line-haul rate. The Commission's authority to determine the point where transportation duty ends and industry convenience begins was upheld by this Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402. We have repeatedly sustained the Commission in its application of *Ex parte 104* principles to particular plants where it has prohibited the performance of services beyond the point fixed under a line-haul rate.[2] In issuing cease and desist orders in these cases the Commission has acted pursuant to its duty to enforce § 6 (7) of the Interstate Commerce Act, which section prohibits departure from filed tariffs and the rendering of preferential services.[3]

As stated, the purpose of these proceedings before the Commission was to determine the beginning and end of

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[2] *Corn Products Refining Co.* v. *United States,* 331 U. S. 790; *Hanna Furnace Corp.* v. *United States,* 323 U. S. 667; *United States* v. *Wabash R. Co.,* 321 U. S. 403; *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156; *A. O. Smith Corp.* v. *United States,* 301 U. S. 669; *Goodman Lumber Co.* v. *United States,* 301 U. S. 669.

[3] "No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." 24 Stat. 379, as amended, 49 U. S. C. § 6 (7).

line-haul service at appellee-smelters' plants. The next question was whether the service rendered by the carriers conformed to the services delimited by the Commission. Thus the Commission, in its proceedings after remand, was not concerned with the question of whether reasonable rates were in force, as it explained in its second report in the *American Smelting Company* case:

> "The question of the reasonableness of published rates or of charges that are or may be fixed for performing industrial services can be decided only in a proceeding brought, or investigation instituted, under different provisions of the act. It is our purpose to make it entirely clear here that our order herein is based solely upon our findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court in our original and supplemental reports in Ex Parte No. 104, Part II, and that said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the published rates are reasonable and do or do not include compensation for switching within the plant areas. We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein." 270 I. C. C. at 362.

With that clear and distinct statement of what it was doing and what it was not doing, the Commission made its findings of fact which appear in the margin.[4] The essen-

[4] The following were the findings of fact relating to the Garfield, Murray and Leadville plants of American Smelting. The findings with respect to the Midvale plant of United States Smelting were substantially identical.

"(1) That it is the duty and obligation of the smelters to obtain

tial part of the findings is that line-haul began and ended at the interchange tracks, known as "assembly yard" at Midvale, the plant of United States Smelting, and the "plant yard" at Garfield, "hold tracks" at Murray, and

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and certify to the carriers the values of ores for the purpose of ascertaining freight charges, and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values.

"(2) That the 'plant yard' at the Garfield plant, the 'hold tracks' at the Murray plant, and the 'flat yard' at the Leadville plant, hereinafter referred to collectively as the 'convenient points' as described in the prior supplemental reports herein, are reasonably convenient points for the delivery and receipt of carload traffic moving to and from the plants of the American Smelting & Refining Company.

"(3) That the several respondents serving said plants move loaded and empty freight cars from said convenient points to points within the plant areas, from such points within the plant areas to the convenient points, and between points within the plant areas.

"(4) That the said services rendered within the plant areas to and from the convenient points are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

"(5) That the said services rendered between points within the plant areas are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

"(6) That the services from and to the convenient points and between points within the plant areas are not and cannot be performed in a continuous movement without interruption or interference at respondents' operating convenience because of the disabilities of the plants, including the manner in which the industrial operations are conducted, all as explained in the prior supplemental reports.

"(7) That the said services rendered between the convenient points and points in the plant areas and between points within the plant areas are in excess of those performed in simple switching and team-track delivery and are industrial or plant services which respondents are not obligated to and should not perform at the line-haul rates.

"(8) That the common-carrier transportation which respondents are obligated to perform begins and ends at the convenient points,

"flat yard" at Leadville, the plants of American Smelting; that all services beyond these points were excess services not required of the carrier as part of its line-haul carriage; and that the performance of services beyond these points without compensatory charges results in preferential service in violation of § 6 (7).

That the Commission is authorized to establish the point where line-haul service begins and ends is not to be doubted. The question, in reviewing the Commission's determination of the convenient points at which line-haul or carrier transportation service begins and ends, is whether such determination is supported by substantial evidence,[5] as this Court said in *United States* v. *Wabash R. Co.*, 321 U. S. 403, 408:

> "In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

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and that all services beyond those points in the plant areas are industrial or plant services for which respondents should make reasonably compensatory charges.

"(9) That the performance by respondents without reasonably compensatory charges in addition to the line-haul rates of the described services within the plant areas beyond the convenient points at any and all of the said plants results in the American Smelting & Refining Company receiving a preferential service not accorded shippers generally and results in the refunding or remitting of a portion of the rates and charges collected in violation of section 6 (7) of the act." *Id.*, at 367–368.

[5] See *Interstate Commerce Commission* v. *Hoboken Manufacturers' R. Co.*, 320 U. S. 368, 378; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, 158; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 408, 409.

In the instant case there is substantial evidence to support the Commission's findings that the convenient points for the beginning and end of line-haul were at the interchange tracks, more specifically characterized above. The Commission had before it the extensive record of the basic proceeding, which the District Court did not have, together with the instant supplemental proceedings. The Commission's findings were based in part on the testimony of its experts who had made personal surveys and observations of switching and car movements at these plants. It is apparent from the record that extensive intraplant services were performed on instructions of and for the convenience of the appellee-smelters. When a car is followed through its intraplant movements on a map, it is demonstrated that extensive services were performed in excess of those which were established as the permissible limit of line-haul in *Ex parte 104*. The Commission's designation of the convenient delivery points at each of these plants must be sustained.

The contention of appellees is that there are now in effect tariffs that compensate for line-haul *and* plant services. These tariffs will be separately discussed below. Appellees urge that the carriers cannot be guilty of violating § 6 (7) when they are fully compensated for carrier services in line-haul and plant services beyond that, since the smelters do not then receive a preferential service not accorded to shippers generally. The corollary of this contention is that to require payment for the plant services in addition to the line-haul rates, in accordance with the Commission's orders, would be to require the smelters to pay twice for the services.

This Court has emphasized that the preference involved in these proceedings is based upon an application of the standards derived from *Ex parte 104* to the unique conditions at particular plants, a preference necessarily resulting when a service is rendered "in excess

of that which the carriers are obliged to perform by their tariffs." *United States* v. *Wabash R. Co., supra,* 412, 413. In *Corn Products Refining Co.* v. *United States,* 331 U. S. 790, this Court affirmed *per curiam* a decision upholding the exclusion, on grounds of irrelevancy, of evidence pertaining to the custom and practice of carriers in making delivery to other shippers. If custom may not be used to interpret "line-haul" after demarcation of transportation and industry service by the Commission, we think it follows that a carrier definition written into filed tariffs does not make impotent the Commission's authority to define the point.

A tariff, effective June 25, 1938, is considered applicable only to the Midvale, Garfield, and Murray plants. By this tariff the "line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement . . . from the road-haul point of delivery to the switching line." [6] 266 I. C. C. at 353–354. There are additional charges for other services in the plants.

If the Commission has the authority to fix the point at which line-haul begins and ends, and we have held that it has, and it designates Point X, obviously the carriers cannot by tariff fix line-haul at Point Y, a further point, and even add one subsequent movement. That would deprive the Commission of its right to determine the point. In the Commission's judgment, which is supported by the evidence, delivery to Point X is the equivalent of team track and simple placement service—the service other shippers receive under a line-haul rate. For the carriers to give the appellee-smelters service to Point

[6] An "uninterrupted movement" is defined in the tariff as "one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter."

Y plus 1 is to accord them service different from that given other shippers under *Ex parte 104* and supplemental proceedings. By the orders in the instant cases, line-haul is translated, as it were, into the tariffs as beginning and ending where the Commission fixed it and not where the appellee-carriers fixed it by tariff. Thereafter, the charge for line-haul must be to the interchange tracks and not to the point fixed in the tariff. Transportation to the latter point at the line-haul rate would be preferential and would violate § 6 (7).

The tariff which is considered by appellee-carriers as applicable only to the Leadville plant is set forth in the margin.[7] It may be noted that this tariff does not provide, as does the 1938 tariff applicable to the other plants, that the line-haul rate includes the intraplant services. Further, the "movement" specified in delivery of a line-haul shipment includes not just one, as provided by the 1938 tariff, but several switching operations which the Commission has classified as "interrupted" terminal switching services, performed for the convenience of the industry only.

The Commission has fixed the point at which line-haul or transportation service ends as the "flat yard" at Leadville and finds there are services performed beyond this point. These industry services must be so com-

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[7] This tariff is almost identical with that which was applicable to all of the plants in 1920. The smelters, we are informed, pay the 1938 tariff under protest, and insist upon the 1920 tariff.

"DELIVERY OF LINE-HAUL CARLOAD SHIPMENT DESTINED TO SMELTER AT LEADVILLE, COLO.

"Delivery of a line-haul carload shipment destined to smelter at Leadville, Colo., will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company."

pensated for, and may not be wrapped up in delivery of a line-haul shipment.

> "Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it." *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 408.

Obviously the plant services at Leadville are different from those at Midvale, Garfield, and Murray under the 1938 tariff, which only emphasizes the wisdom of Congress in empowering the Commission to fix the point where line-haul begins and ends with a view to giving all shippers equivalent service. The Commission has standardized such service as team track or simple placement switching. What we now hold is that the Commission has the power to fix the point at which line-haul or carrier service begins and ends. This is necessary because the need for switching varies from plant to plant; indeed, some plants may need no intraplant switching service. Thus, unless the Commission can fix the beginning and ending point of the line-haul, some shippers would pay an identical line-haul rate for less service than that required by other industrial plants. See *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 526. A different point fixed by the carrier in its tariff gives service in excess of that accorded shippers generally as established in *Ex parte 104,* and therefore amounts to an unlawful preferential service.

As to the argument that to require the carriers to conform to the Commission's orders would require the appellee-smelters to pay twice for their service, the short

answer is that appellees misconceive the scope of this proceeding, which is solely to define what is embraced in line-haul transportation. We accept the admonition of the Commission in its second report, quoted *supra,* and reiterated in its brief, that it was not here concerned, and made no finding, as to whether the charge made for the service was or was not compensatory. We think that the Commission has authority to exclude rate questions from this proceeding. If the carriers so wish, they may file a new tariff to conform their charges to the services indicated in the Commission's order. 49 U. S. C. § 6 (1) and (3). If the carrier makes a double or unreasonable charge, the industry may be heard upon the reasonableness of the rate. 49 U. S. C. §§ 9, 13, 15.

Finally it is contended that the District Court judgment should be affirmed because there was no appeal from the judgment and mandate when the case was sent back to the Commission, the court having found that there was no evidence to sustain a Commission finding that the line-haul rates were not compensatory for the services rendered. Appellees argue that that decision became the law of the case.

The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. *Messenger* v. *Anderson,* 225 U. S. 436, 444; *Insurance Group* v. *Denver & R. G. W. R. Co.,* 329 U. S. 607, 612. It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri.* The Commission had a right on reconsideration to make a new record. *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364, 374–75. When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary in-

junction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. 28 U. S. C. § 1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of *res judicata.* Compare *United States* v. *Wallace Co.,* 336 U. S. 793, 800–801. And although the latter is a uniform rule, the "law of the case" is only a discretionary rule of practice. It is not controlling here. See *Southern R. Co.* v. *Clift,* 260 U. S. 316, 319.

Judgment reversed.

Mr. Justice Jackson dissents.

Mr. Chief Justice Vinson and Mr. Justice Douglas took no part in the consideration or decision of this case.

DARR *v.* BURFORD, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 51. Submitted December 5, 1949.—Decided April 3, 1950.

Petitioner, a state prisoner, applied to a Federal District Court for habeas corpus without petitioning this Court for certiorari from a denial of habeas corpus on the merits by the highest state court or excusing his failure to do so. Limiting its consideration of the application solely to the question whether it presented an extraordinary instance that called for disregard of accustomed procedure of petitioning this Court for certiorari, the District Court found that nothing extraordinary appeared and discharged the writ. *Held:* The District Court properly refused to examine further into the merits of the petition and properly discharged the writ. Pp. 201–219.

(a) Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal district court only after all state remedies available, including all appellate remedies in the state courts, have been exhausted and review has been denied by this Court. *Ex parte Hawk*, 321 U. S. 114. Pp. 203–208.

(b) Whatever deviation from the established rule may be inferred from or implied by *Wade* v. *Mayo*, 334 U. S. 672, is corrected by this decision. Pp. 208–210.

(c) In § 2254 of the 1948 recodification of the Judicial Code, Congress accepted the rule of the *Hawk* case as a sound rule to guide consideration of habeas corpus in federal courts. Pp. 210–214.

(d) Though a refusal of certiorari by this Court may carry no weight on the merits upon a later application to a federal district court for habeas corpus, comity ordinarily requires an application for review by this Court before a lower federal court may be asked to intervene in state matters. Pp. 214–217.

(e) In this case, petitioner did not sustain the burden of showing that circumstances of peculiar urgency existed to require prompt federal intervention. P. 219.

172 F. 2d 668, affirmed.

Petitioner's application for habeas corpus, to secure his release from imprisonment under a state court conviction allegedly in violation of the Federal Constitution, was denied by the District Court. 77 F. Supp. 553. The Court of Appeals affirmed. 172 F. 2d 668. This Court granted certiorari. 337 U. S. 923. *Affirmed,* p. 219.

John B. Ogden submitted on brief for petitioner.

Mac Q. Williamson, Attorney General of Oklahoma, and *Sam H. Lattimore,* Assistant Attorney General, submitted on brief for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner Darr, an inmate of the Oklahoma state penitentiary, has been denied federal habeas corpus for failure to exhaust his other available remedies. Petitioner's omission to apply here for certiorari from the state court's denial of habeas corpus was held an error, fatal to consideration on the merits. Therefore the merits of petitioner's claims of imprisonment in violation of the Constitution are not before us. The petition for certiorari requires us to pass solely upon the correctness of the lower court's view that ordinarily a petition for certiorari must be made to this Court from a state court's refusal of collateral relief before a federal district court will consider an application for habeas corpus on its merits.

Petitioner was serving a term in the Oklahoma state penitentiary when, on November 28, 1930, he was summoned to appear in another Oklahoma county to plead to two separate charges of armed bank robbery. In January of 1931, he was tried by jury, and convicted on the first charge; petitioner then pleaded guilty to the second. He was sentenced to two terms of forty years each, to run consecutively, and the first sentence is now being served.

No appeal from the conviction was taken, but in 1947 petitioner applied to the Oklahoma Court of Criminal Appeals for habeas corpus. Judging only from the state court's opinion,[1] for the original petition is not included in the record before us, petitioner alleged in the state court that he had been without funds to employ counsel, that he had not had the aid of counsel of his own choosing, and had not been provided sufficient time to procure and prepare witnesses for his defense. These allegations were reviewed by the state court and the writ was denied on the merits. No application for certiorari was made here.

Petitioner then filed in the United States District Court for the Eastern District of Oklahoma the application for habeas corpus here at bar. The allegations were those passed upon by the Oklahoma Court of Criminal Appeals, with the addition of a claim that petitioner's plea of guilty to the second armed robbery charge had been coerced. After hearing petitioner's testimony in open court, the District Judge examined into the merits sufficiently to assure himself that no extraordinary circumstances existed sufficient to justify federal inquiry into the merits of petitioner's allegations without the exhaustion of all other available remedies.[2] He then concluded that the writ must be discharged as to the first sentence since petitioner had not applied for certiorari here from the state court's denial of habeas corpus. The allegations of a coerced plea underlying the second sentence could not properly be considered, held the court, first, because petitioner had not raised the point in the state proceeding, and further because petitioner is not presently being detained under that sentence. Therefore no adjudication on the merits was given.[3] The Court of Appeals for the

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[1] *Ex parte Darr*, 84 Okla. Cr. 352, 182 P. 2d 523.

[2] 77 F. Supp. 553, 556.

[3] 77 F. Supp. 553.

Tenth Circuit affirmed, one judge dissenting from the proposition that application for certiorari is a requisite step in the exhaustion of remedy.[4]

It is not argued that the courts below state the law incorrectly insofar as the second conviction is concerned. It has long been settled that the federal courts will not consider on habeas corpus claims which have not been raised in the state tribunal; [5] and in any event, it is unquestioned doctrine that only the sentence being served is subject to habeas corpus attack.[6] Further, since neither court based its conclusion upon petitioner's failure to appeal from his initial conviction, that issue is not before us. There is no problem of jurisdiction or power in the federal courts to consider applications for habeas corpus. Nor is there at issue the effect of a refusal of certiorari by this Court upon future applications for federal habeas corpus by the state prisoner. The issue of exhaustion of remedy, however, is not only of vital concern to those who would seek the protection of the Great Writ, but in the case of state prisoners is crucial to the relationship between the state and federal sovereignties in the exercise of their coordinate power over habeas corpus. Doubt respecting this issue should not go unresolved. We therefore granted certiorari. 337 U. S. 923.

The writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights.[7] To make this protection effective for unlettered prisoners without friends or funds, federal courts have long disregarded legalistic requirements in examining applications for the writ and judged the papers

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[4] 172 F. 2d 668 (C. A. 10th Cir.).

[5] *Davis* v. *Burke*, 179 U. S. 399.

[6] *McNally* v. *Hill*, 293 U. S. 131.

[7] *Hawk* v. *Olson*, 326 U. S. 271, 274.

by the simple statutory test of whether facts are alleged that entitle the applicant to relief.[8]

This favorable attitude toward procedural difficulties accords with the salutary purpose of Congress in extending in 1867 the scope of federal habeas corpus beyond an examination of the commitment papers under which a prisoner was held to the "very truth and substance of the causes of his detention." [9] Through this extension of the boundaries of federal habeas corpus, persons restrained in violation of constitutional rights may regain their freedom. But, since the 1867 statute granted jurisdiction to federal courts to examine into alleged unconstitutional restraint of prisoners by state power, it created an area of potential conflict between state and federal courts. As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.[10]

Since habeas corpus is a discretionary writ, federal courts had authority to refuse relief as a matter of comity until state remedies were exhausted. Through this

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[8] *Holiday* v. *Johnson*, 313 U. S. 342, 350; *Price* v. *Johnston*, 334 U. S. 266, 291–92; 28 U. S. C. § 2242, restating R. S. § 754.

[9] See *Hawk* v. *Olson*, *supra*, pp. 274–75, notes 3, 4.

[10] Comity through discretion in granting habeas corpus had an antecedent in an early statutory command restraining federal injunctive interference with state courts. 28 U. S. C. § 2283; 1 Stat. 334, § 5; see *Bowles* v. *Willingham*, 321 U. S. 503. Cf. the three-judge district court provisions, 28 U. S. C. §§ 2281, 2284.

comity, the doctrine of exhaustion of state remedies has developed steadily from cases refusing federal habeas corpus before state trial to a statutory direction that federal courts shall not grant the writ to a state prisoner until state remedies have been exhausted. *Ex parte Royall,*[11] decided in 1886, held that a federal district court had jurisdiction to release before trial a state prisoner who was held in violation of federal constitutional rights, but it approved denial of the writ as a matter of discretion. It was not to be presumed that "the decision of the State court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court . . . ."[12] Analogy was found in earlier cases where state and federal jurisdiction to attach property had been found to overlap. Apropos were the words of the Court in *Covell* v. *Heyman:*[13]

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity."

In the same term of court the doctrine was advanced to its next stage, for in *Ex parte Fonda*[14] the prisoner sought his federal relief in this Court after his state conviction but before he had prosecuted his appeal to the state appellate tribunal. Stressing the importance of noninterference

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[11] 117 U. S. 241.

[12] 117 U. S. 241, 252; *Cook* v. *Hart,* 146 U. S. 183.

[13] 111 U. S. 176, 182.

[14] 117 U. S. 516.

with the orderly processes of appellate review, this Court denied the writ, for if the trial court had erred to the prejudice of petitioner's constitutional rights, it could not be assumed that the state appellate court would suffer the error to go uncorrected.[15]

The established doctrine was applied to meet the variations presented by the cases. By 1891, it was clear that a federal circuit court committed no error in refusing a writ on the ground that the petitioner had not come to this Court on writ of error; [16] and a great body of cases affirmed this holding that the petitioner should be "put to his writ of error." [17] *Baker* v. *Grice* [18] states the reason for the rule that after a final determination of the case by the state court, the federal courts will even then generally leave the petitioner to his remedy by writ of error from this Court.

> ". . . It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented."

And to this the Court added, in *Markuson* v. *Boucher*,[19] the explicit reason why the exhaustion principle must

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[15] *In re Duncan*, 139 U. S. 449, 454.

[16] *In re Wood*, 140 U. S. 278.

[17] *In re Jugiro*, 140 U. S. 291; *In re Frederich*, 149 U. S. 70, 77–78; *New York* v. *Eno*, 155 U. S. 89, 98; *Pepke* v. *Cronan*, 155 U. S. 100; *Whitten* v. *Tomlinson*, 160 U. S. 231, 242; *Tinsley* v. *Anderson*, 171 U. S. 101, 104–105; *Minnesota* v. *Brundage*, 180 U. S. 499, 503; *Reid* v. *Jones*, 187 U. S. 153; *Urquhart* v. *Brown*, 205 U. S. 179, 181–82; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17.

[18] 169 U. S. 284, 291.

[19] 175 U. S. 184, 187.

extend to remedies available in this Court as well as those open in the state tribunals.

> "The jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a State in which the constitutional rights of a prisoner could have been claimed . . . ."

In 1913, a petitioner was denied an original writ here even though he had appealed and had applied for state habeas corpus, with the comment that writ of error to this Court was required.[20] And following next upon the heels of an adjudication that a state habeas corpus action is a "suit" yielding a final reviewable judgment,[21] came the leading case of *Mooney* v. *Holohan,*[22] clearly establishing the rule that available collateral attacks in the state tribunals must be exhausted in addition to direct attacks on the conviction.[23] In 1944 the unanimous *per curiam* opinion of *Ex parte Hawk* stated the fully developed and established exhaustion doctrine in its most frequently quoted form.[24]

> "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted."

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[20] *Ex parte Spencer,* 228 U. S. 652, 660–61.

[21] *Bryant* v. *Zimmerman,* 278 U. S. 63, 70.

[22] 294 U. S. 103.

[23] The point has been confirmed many times. *Ex parte Botwinski,* 314 U. S. 586; *Ex parte Davis,* 317 U. S. 592; *Ex parte Williams,* 317 U. S. 604; *Ex parte Abernathy,* 320 U. S. 219; and see cases cited in note 25, *infra.*

[24] 321 U. S. 114, 116–17.

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The doctrine of *Ex parte Hawk* has been repeatedly approved,[25] and in *White* v. *Ragen* the same Court again unanimously restated that principle in the clearest language.[26]

> "Where the highest state court in which a decision could be had considers and adjudicates the merits of a petition for habeas corpus, state remedies, including appellate review, are not exhausted so as to permit the filing of a petition for habeas corpus in a federal district court, unless the federal question involved is presented to this Court on certiorari or appeal from the state court decision."

Thus comity, which had constrained the lower federal courts to refuse a grant of the Great Writ when remedies in state courts were still open, brought forth the related rule that lower federal courts ordinarily will not allow habeas corpus if the applicant has not exhausted his remedy in this Court by certiorari or appeal from state courts' refusal of relief on collateral attack.

In *Wade* v. *Mayo* alone,[27] a case decided less than four years later, does there appear language that may be construed as a departure from the established rule. The District Court was allowed to hear Wade's petition for habeas corpus even though he had not applied here for certiorari, because there was grave doubt whether the state judgment constituted an adjudication of a federal question. The Court said, at p. 682:

> "That doubt was such as to make it reasonably certain that this Court would have denied certiorari on the theory that an adequate state ground ap-

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[25] *White* v. *Ragen*, 324 U. S. 760, 767; *House* v. *Mayo*, 324 U. S. 42, 46, 48; *Marino* v. *Ragen*, 332 U. S. 561, 564; *Wade* v. *Mayo*, 334 U. S. 672, 679; *Young* v. *Ragen*, 337 U. S. 235, 238. And see note 32, *infra*.

[26] 324 U. S. 760, 764.

[27] 334 U. S. 672.

> peared to underlie the judgment. His failure to make this futile attempt to secure certiorari accordingly should not prejudice his subsequent petition for *habeas corpus* in the District Court."

We had pointed out in *White* v. *Ragen, supra,* a *per curiam* expressly reiterating the *Hawk* doctrine, that where a state court's "decision is based upon some other adequate non-federal ground, it is unnecessary for the petitioner to ask this Court for certiorari in order to exhaust his state remedies, since we would lack jurisdiction to review the decision of the state court." [28]

Not limiting its discussion to the holding on the *Hawk* exception, however, *Wade* also treated with the general *Hawk* rule of the necessity for review here before seeking the writ in the federal district court. The thought behind the language on that point evidently was that review here is not usually required as a condition to a hearing on the merits in the district court. *Wade* did recognize that failure to come here might be relevant in determining whether a district court should entertain an application. On p. 680 it is said:

> "After state procedure has been exhausted, the concern is with the appropriate federal forum in which to pursue further the constitutional claim. The choice lies between applying directly to this Court for review of the constitutional issue by certiorari or instituting an original *habeas corpus* proceeding in a federal district court. Considerations of prompt and orderly procedure in the federal courts

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[28] 324 U. S. 760, 765. In the *White* case we concluded that the state ground was the refusal by the Supreme Court of Illinois to entertain applications with possible fact controversies. Pp. 766–67. We made it clear that while proper procedure does not require review in this Court of a judgment denying habeas corpus on an adequate state ground, other available state remedies must be exhausted before an application should be entertained in a district court. P. 767.

> will often dictate that direct review be sought first in this Court. And where a prisoner has neglected to seek that review, such failure may be a relevant consideration for a district court in determining whether to entertain a subsequent *habeas corpus* petition."

We do not stop to reexamine the meaning of *Wade's* specific language. Whatever deviation *Wade* may imply from the established rule will be corrected by this decision.

Ex parte Hawk prescribes only what should "ordinarily" be the proper procedure; all the cited cases from *Ex parte Royall* to *Hawk* recognize that much cannot be foreseen, and that "special circumstances" justify departure from rules designed to regulate the usual case. The exceptions are few but they exist.[29] Other situations may develop. Compare *Moore* v. *Dempsey,* 261 U. S. 86. Congress has now made statutory allowance for exceptions such as these, leaving federal courts free to grant habeas corpus when there exist "circumstances rendering such [state] process ineffective to protect the rights of the prisoner." 28 U. S. C. § 2254.

In § 2254 of the 1948 recodification of the Judicial Code, Congress gave legislative recognition to the *Hawk* rule for the exhaustion of remedies in the state courts and this Court.[30] This was done by embodying in the new statute

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[29] See *White* v. *Ragen,* 324 U. S. 760; *Ex parte Royall,* 117 U. S. 241, 251.

[30] *Young* v. *Ragen,* 337 U. S. 235, 238. 28 U. S. C. § 2254 reads:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies

the rulings drawn from the precedents.[31] The rulings had been definitively restated in *Hawk*. That case had represented an effort by this Court to clear the way for prompt and orderly consideration of habeas corpus petitions from state prisoners. This Court had caused the *Hawk* opinion to be distributed to persons seeking federal habeas corpus relief from state restraint and the opinion had been generally cited and followed.[32] There is no doubt that Congress thought that the desirable rule drawn from the existing precedents was stated by *Hawk*, for the statutory reviser's notes inform us that

> "This new section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. Ed. 572.)" [33]

While this section does not refer expressly to the requirement for application to this Court for review, it must be read in the light of the statement quoted on p. 207, *supra*, from *Hawk*. So read, there was occasion nei-

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available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[31] Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 3214, April 22 to June 7, 1948, 80th Cong., 2d Sess., p. 28. See 28 U. S. C. Congressional Service, p. XXVIII; H. R. Rep. No. 308 on H. R. 3214, 80th Cong., 1st Sess., p. 3.

[32] See *Lyon* v. *Harkness*, 151 F. 2d 731, 733 (C. A. 1st Cir., N. H.); *United States ex rel. Monsky* v. *Warden of Clinton State Prison*, 163 F. 2d 978, 980 (C. A. 2d Cir., N. Y.); *Stonebreaker* v. *Smyth*, 163 F. 2d 498, 501, 502 (C. A. 4th Cir., Va.); *Nusser* v. *Aderhold*, 164 F. 2d 127 (C. A. 5th Cir., Ga.); *Makowski* v. *Benson*, 158 F. 2d 158 (C. A. 6th Cir., Mich.); *United States ex rel. Ross* v. *Nierstheimer*, 159 F. 2d 994 (C. A. 7th Cir., Ill.); *Guy* v. *Utecht*, 144 F. 2d 913, 915 (C. A. 8th Cir., Minn.); *Gordon* v. *Scudder*, 163 F. 2d 518 (C. A. 9th Cir., Cal.); *Herzog* v. *Colpoys*, 79 U. S. App. D. C. 81, 143 F. 2d 137, 138.

[33] See S. Rep. No. 1559, 80th Cong., 2d Sess., p. 9 and H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A180.

ther for the draftsmen of § 2254 to make reference to review in this Court, nor for the committees of the House or Senate or members of Congress to comment upon it. It is immaterial whether as a matter of terminology it is said that review in this Court of a state judgment declining relief from state restraint is a part of the state judicial process which must be exhausted, or whether it is said to be a part of federal procedure. The issue cannot be settled by use of the proper words. *Hawk* treated review here as a state remedy. *Wade* thought it was not state procedure. But undoubtedly review here is a part of the process by which a person unconstitutionally restrained of his liberty may secure redress. *Ex parte Hawk* had made it clear that all appellate remedies available in the state court and in this Court must be considered as steps in the exhaustion of the state remedy in the sense that the term is used, perhaps inexactly, in the field of habeas corpus.[34] Consideration of the legislative

[34] Subsequent statements by Judge John J. Parker, who served as Chairman of the Judicial Conference of Senior Circuit Judges, Committee on Habeas Corpus, are instructive.

". . . The thing in mind in the drafting of this section was to provide that review of state court action be had so far as possible only by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by the lower federal courts, whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction. . . .

"One of the incidents of the state remedy is [the] right to apply to the Supreme Court for certiorari. If a petitioner has failed to make such application after the refusal of the state court to release him, he cannot be said to have exhausted the remedies available to him under state procedure, provided he has the right to apply again to the state courts for relief as a basis for application to the Supreme Court for certiorari. . . .

"The fact that certiorari from the Supreme Court to the state court may be called a federal remedy is not determinative of the question here involved. The crucial matter is that petitioner still has a right to attack in the courts of the state the validity of his

history of § 2254 reveals no suggestion that the draftsmen intended to alter the sense of the term as defined in *Hawk* or to differentiate between exhaustion of state remedies and review in this Court. All the evidence manifests a purpose to enact *Hawk* into statute. The reviser's notes, explicitly stating this purpose, remained unchanged throughout the bill's legislative progress.[35] So did the statement of the exhaustion principle contained in the first paragraph of § 2254 down to the first "or." [36] None of the changes or additions made by the Senate to § 2254 affected the problem of review here. They were directed at other issues.[37]

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conviction and, upon the record made in such attack, to petition the highest court of the land for a review. So long as such right remains, he does not have, and ought not have, the right to ask a review by one of the lower federal courts. . . ." Parker, Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171, 176–77.

Wade v. *Mayo, supra,* had no effect on the discussion of § 2254, since it came down two days prior to the enactment of the new code, too late for consideration.

[35] See H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A180, and final reviser's note to § 2254.

[36] See note 30, *supra.* Compare § 2254, H. R. 3214, Union Calendar #140, H. R. Rep. No. 308, 80th Cong., 1st Sess., with § 2254, H. R. 3214 in Senate, S. Rep. No. 1559, 80th Cong., 2d Sess., p. 9.

[37] The two exceptions at the last of the first paragraph provide for particular situations in the states. The definition of exhaustion in the last paragraph was made by the Senate at the instance of the Judicial Conference of Senior Circuit Judges. S. Rep. No. 1559, 80th Cong., 2d Sess., p. 9. Report of the Judicial Conference, September Session 1947, p. 17.

H. R. 3214 had permitted federal habeas corpus not only where state remedies had been exhausted but where "there is no adequate remedy available in" the state court. The Senate Report informs us that the purpose of the Senate amendment was "to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment." S. Rep. No. 1559, 80th Cong., 2d Sess., p. 10.

It seems sure that Congress drafted and enacted § 2254 expecting review here in conformity with the *Hawk* rule. Nothing indicates to us a desire on the part of Congress to modify the language. We think the rule of the *Hawk* case that ordinarily requires an effort to obtain review here has been accepted by Congress as a sound rule to guide consideration of habeas corpus in federal courts.

There is an insistence voiced by the dissent that we determine what effect the lower federal courts should accord a denial of certiorari by this Court when the state prisoner later applies for federal habeas corpus. The issue of the effect of such a denial apparently could arise only in a case where, after our refusal, the state prisoner presented his application to another federal court. It is not here in this case. We doubt the effectiveness of a voluntary statement on a point not in issue.[38] Whether a refusal to grant certiorari imports an opinion on any issue or not, the reason persists for requiring an application here from the state refusal before application to another federal court.

There should be no controversy over whether the refusal of certiorari "would serve the purpose of an adjudication on the merits." All the authorities agree that *res judicata* does not apply to applications for habeas corpus. The courts must be kept open to guard against injustice

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[38] Compare Bowen, L. J., in *Cooke* v. *New River Co.*, 38 Ch. D. 56, 70–71: ". . . like my Brothers who sit with me, I am extremely reluctant to decide anything except what is necessary for the special case, because I believe by long experience that judgments come with far more weight and gravity when they come upon points which the Judges are bound to decide, and I believe that *obiter dicta*, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases." *Cohens* v. *Virginia*, 6 Wheat. 264, 399–400; *Wright* v. *United States*, 302 U. S. 583, 593–594.

through judicial error.[39] Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner.[40] On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits because they have already been decided against the petitioner.[41] Thus there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds, and repeated adjudications of the same issues by courts of coordinate powers.

In this way the record on certiorari in this Court is brought to the attention of the trial court. There have been statements made in former opinions of this Court as to the effect of denial of petitions for habeas corpus.[42] Records presented to this Court on petitions in habeas corpus cases raise many different issues. There may be issues of state procedure, questions of fact regarding the alleged violations of constitutional rights, and issues of law respecting the scope of constitutional rights—problems made difficult by the frequent practice of state courts to dismiss the applications without opinion. If this Court has doubts concerning the basis of state court judgments, the matter may be handled as in *Burke* v. *Georgia,* 338 U. S. 941, with an express direction that the petitioner may proceed in the federal district court without prejudice from the denial of his petition for certiorari. If the District Court feels that error may have occurred, it has power to examine the application to see if circumstances exist to justify it in holding a hearing on the

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[39] *Salinger* v. *Loisel,* 265 U. S. 224, 230.

[40] *Ex parte Royall,* 117 U. S. 241.

[41] *Salinger* v. *Loisel,* note 39, *supra.*

[42] *Ex parte Hawk,* 321 U. S. 114, 117; *House* v. *Mayo,* 324 U. S. 42, 48; *White* v. *Ragen,* 324 U. S. 760, 764–65.

merits. Such freedom of action protects the Great Writ without trivializing it.[43]

But it is argued that if the denial of certiorari mean nothing, the result of our decision is to force a "meaningless step." We do not agree. Though our denial of certiorari carry no weight in a subsequent federal habeas corpus proceeding, we think a petition for certiorari should nevertheless be made before an application may be filed in another federal court by a state prisoner. The requirement derives from the basic fact that this republic is a federation, a union of states that has created the United States. We have detailed the evolution of and the reason for the conclusion that the responsibility to intervene in state criminal matters rests primarily upon this Court. It is this Court which ordinarily should reverse state court judgments concerning local criminal administration. The opportunity to meet that constitutional responsibility should be afforded. Even if the District Court may disregard our denial of certiorari, the fact that power to overturn state criminal administration must not be limited to this Court alone does not make it less desirable to give this Court an opportunity to perform its duty of passing upon charges of state violations of federal constitutional rights. This Court has evolved a procedure which assures an examination into the substance of a prisoner's protest against unconstitutional detention without allowing destructive abuse of the precious guaranty of the Great Writ. Congress has specifically approved it. Though a refusal of certiorari have no effect upon a later application for federal habeas corpus, a petition for certiorari here ordinarily should be required.

The answer to petitioner's argument that he should not be required to seek review here from a state's refusal

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[43] *Dorsey* v. *Gill*, 80 U. S. App. D. C. 9, 148 F. 2d 857.

to grant collateral relief before applying to other federal courts involves a proper distribution of power between state and federal courts. The sole issue is whether comity calls for review here before a lower federal court may be asked to intervene in state matters. We answer in the affirmative. Such a rule accords with our form of government. Since the states have the major responsibility for the maintenance of law and order within their borders, the dignity and importance of their role as guardians of the administration of criminal justice merits review of their acts by this Court before a prisoner, as a matter of routine, may seek release from state process in the district courts of the United States. It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction springs the requirement of prior application to this Court to avoid unseemly interference by federal district courts with state criminal administration.

As the *Hawk* requirement, we think, has always been the rule, no change in procedure is necessary and the reiteration of the rule in this decision can, of course, result in no shifting of the burden of work among federal courts.[44] No person restrained by state process could heretofore have been certain of a hearing on the merits of his application to a federal district court unless he had sought review in this Court of the state's refusal to release him.[45] Further, the rule contributes toward expeditious administration, since it raises the constitutional issue in a federal forum immediately, without the necessity of a second trial

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[44] See note 32, *supra.*

[45] *Wade* v. *Mayo,* 334 U. S. 672, 681.

court proceeding and the compilation of a second record. And while the rule has the merit of reasonable certainty, it does not err on the side of unreasonable rigidity. Flexibility is left to take care of the extraordinary situations that demand prompt action. Solicitous as we are that no man be unconstitutionally restrained and that prompt, certain and simple methods for redress be available, those ends for which modern habeas corpus has been evolved can best be achieved by requiring in ordinary cases the exhaustion of state remedies and review here.

The present case involves a refusal, on the merits, of state collateral relief from a conviction allegedly obtained in violation of the Constitution. No review was sought in this Court of the state's refusal. Instead, without alleging that review had been sought in this Court and without reliance upon any pleaded facts to excuse such failure, the petitioner filed his application for this habeas corpus in the District Court. Limiting its consideration of the application solely to the question as to whether this was an extraordinary instance that required disregard of accustomed procedure, the District Court found that this was not a case of peculiar urgency. We agree with the lower court's conclusion that it should go no further into consideration of the application. A conviction after public trial in a state court by verdict or plea of guilty places the burden on the accused to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that in his prosecution the state so departed from constitutional requirements as to justify a federal court's intervention to protect the rights of the accused.[46] The petitioner has the burden also of

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[46] *In re Cuddy,* 131 U. S. 280; *Johnson* v. *Zerbst,* 304 U. S. 458, 468; *Walker* v. *Johnston,* 312 U. S. 275, 286; *Hawk* v. *Olson,* 326 U. S. 271, 279.

showing that other available remedies have been exhausted or that circumstances of peculiar urgency exist. Nothing has been pleaded or proved to show that here exceptional circumstances exist to require prompt federal intervention. Oklahoma denied habeas corpus after obviously careful consideration.[47] If that denial violated federal constitutional rights, the remedy was here, not in the District Court, and the District Court properly refused to examine the merits.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BURTON, with whom MR. JUSTICE CLARK joins, concurs in the judgment and opinion of the Court, except for any indication it may contain that, although the reasons for a denial of certiorari are not stated, they nevertheless may be inferred from the record. He believes that the nature of the proceeding is such that, when the reasons for a denial of certiorari are not stated, the denial should be disregarded in passing upon a subsequent application for relief, except to note that this source of possible relief has been exhausted.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK joins, dissenting.*

This case concerns the exercise by the District Courts of their *habeas corpus* jurisdiction on behalf of State prisoners when a petition for certiorari to review a State court's determination of a federal claim was not first brought in this Court. In the generality of instances the issue is whether denial of certiorari is a prerequisite to

[47] *Ex parte Darr*, 84 Okla. Cr. 352, 182 P. 2d 523.

*[MR. JUSTICE JACKSON also joined in this opinion. See *post*, p. 238.]

resort to the District Courts. The case thus raises serious questions affecting the relations between State and federal authorities as well as between this Court and the lower federal courts. My view in brief is that federal courts must withhold interference with State criminal justice until every opportunity available in the State courts for the vindication of a federal right has been exhausted. Whether the State remedies have been so exhausted often involves elusive questions of local law with which district judges are more familiar than we can be without the light the lower courts afford us. Therefore, the power of the District Courts to issue a writ of *habeas corpus* should not be barred simply because a petition for certiorari was not first made in this Court. To hold otherwise is to disregard the settled rule that denial of certiorari has no legal significance or, in the alternative, if denial of certiorari remains without bearing on the merits in *habeas corpus* as in other cases, to require the State prisoner to go through the motion of securing a denial is to command a gesture which is meaningless to him and burdensome to this Court. In any event, to leave the District Courts in the dark as to what a denial of certiorari means in *habeas corpus* cases is not consistent with the fair administration of justice.

1. The course of our decisions on the power of the lower federal courts to entertain an application for a writ of *habeas corpus* on behalf of State prisoners has not run smooth. There is a reason. This seemingly technical problem of jurisdiction concerns the relation of the United States and the courts of the United States to the States and the courts of the States. Under any circumstances this "is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years . . . ." Memorandum of Mr. Justice Holmes, August 20, 1927, denying an application for stay pending a petition for certiorari. 5 The Sacco-Vanzetti Case 5516.

Prior to the Civil War, *habeas corpus* was available in the United States courts, barring limited exceptions, only for those in federal custody. The Act of February 5, 1867, extended the power of the United States courts to grant writs of *habeas corpus* to "all cases where any person may be restrained of his . . . liberty in violation of the constitution, or of any treaty or law of the United States . . . ." 14 Stat. 385. A conflict between State and federal authorities in relation to the administration of criminal justice touches that "very delicate matter" at its most sensitive point. The Act of 1867 opened wide the door to that conflict. It has become intensified during the last twenty years because of the increasing subjection of State convictions to federal judicial review through the expanded concept of due process. See, *e. g., Powell* v. *Alabama,* 287 U. S. 45, and *Mooney* v. *Holohan,* 294 U. S. 103. It ought not to be too surprising, therefore, that the full implications of federal restrictions upon the free range of a State's criminal justice have taken time to unfold.

2. Decisions on matters of procedure within the Court's control ought not to be like shifting sand. Quick fluctuations in them should be avoided unless a rule of practice has proven itself mischievous in practice. The real question before us in this case is whether *Wade* v. *Mayo,* 334 U. S. 672, should be overruled. Whether this overruling is to be done forthrightly by two words saying the case "is overruled" or the overruling is euphemistically done by fifteen words hardly changes the fact. Respect for an explicit adjudication on a matter of procedure very recently rendered after the fullest consideration, as well as the soundness of the decision, should lead us to adhere to *Wade* v. *Mayo.*

3. The weight which attaches to a decision of this Court particularly on matters of practice is naturally enough affected by the circumstances attending it. Apart

from the intrinsic justification of *Wade* v. *Mayo* on grounds of policy, to which I shall shortly advert, that decision was a product of the deliberative process at its weightiest. On original submission in October, 1947, and full consideration by the Court, the case was restored to the docket in November, 1947, was resubmitted on March 9, 1948, received thorough reconsideration by the Court, and after long incubation was decided on June 14, 1948. The procedural issue which received this unusual attention was thus phrased in the Court's opinion:

> "whether it was proper for a federal district court to entertain a *habeas corpus* petition filed by a state prisoner who, having secured a ruling from the highest state court on his federal constitutional claim, had failed to seek a writ of certiorari in this Court." 334 U. S. at 674–75.

This is the way the issue was framed in the dissenting opinion:

> "The first question in this case is whether Wade's failure to bring a writ of certiorari to this Court from the judgment of the Florida Supreme Court in his state habeas corpus proceeding should affect his effort to obtain release through a federal writ of habeas corpus. Or, to rephrase the problem, should certiorari to this Court be considered a part of the state remedy for purposes of the well-recognized doctrine of exhaustion of state remedies?" 334 U. S. at 686.

The problem as rephrased in the dissent stated with precision the decisive inquiry. Relief from a federal court cannot come until corrective State process to vindicate the claimed federal right is unavailable. This has been so ever since *Ex parte Royall*, 117 U. S. 241. Therefore, if the "state remedies" which must be exhausted include an application for review of a State court's decision by our discretionary writ of certiorari, it would be pre-

mature for a District Court to entertain a petition for *habeas corpus* before such application. That question—whether a petition for certiorari is to be deemed part of the "state remedies"—had never been canvassed by this Court. The Court had made some uncritical assertions about it and in a moment I shall deal with them. But the problem had never been critically analyzed until the issue became determinative of the decision in *Wade* v. *Mayo*.

4. The answer which the dissent gave to the problem determined the dissent. It concluded "that certiorari should be considered a part of the state procedure for purposes of habeas corpus." 334 U. S. at 689. The Court's analysis of the problem led to the contrary result. While fully acknowledging the principle that State remedies must be exhausted before relief can be sought in a federal court, it rejected the notion that an application to this Court for review by certiorari can be deemed part of the State remedies.

5. Now the Court likewise rejects the basis of the dissent in *Wade* v. *Mayo*—that a petition for certiorari is to be deemed part of State remedies and as such must be exhausted. But it retains the conclusion which was drawn from the rejected premise. It does so in complete disregard of our repeated insistence regarding the significance of denial of petitions for certiorari, reflecting the narrow range of inquiry not going to the merits which alone is open on such petitions. Likewise disregarded are practical considerations relating to the administration of this Court's business, particularly the inherent difficulties of ascertaining in this Court in the first instance the available remedies under State procedure, which is a threshold question in determining whether State remedies have been exhausted.

6. Of course a State prisoner can come here and seek review, by way of certiorari, of a denial by the State court

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of his alleged federal constitutional right. The Court may grant his petition and decide the issue against him. If the petition is granted and the State's view of his federal claim is sustained here, he may still sue out a writ in the District Court. The doctrine of *res judicata* is inapplicable. In the *Sacco-Vanzetti* case, application was first made to the Circuit Justice, then to the Senior Circuit Judge, and thereafter to the District Judge. See 5 The Sacco-Vanzetti Case 5532, 5533, 5534. To be sure, prior denials carry considerable weight in disposing of a later application, but merely by way of safeguard against "abusive use" of the writ while fully respecting "its recognized status as a privileged writ of freedom." *Salinger* v. *Loisel,* 265 U. S. 224, 232.

Our problem is not whether a petitioner may come here after exhausting his State remedies but whether he must come here and have his petition for certiorari denied as a condition to invoking a federal court's jurisdiction on *habeas corpus.* An answer to this question necessarily turns on the significance of a denial of certiorari. MR. JUSTICE REED'S opinion makes a Delphic disposition of this issue, which will inevitably create confusion among federal judges. It surely does not make for clarity of doctrine nor does it promote the practical administration of justice to suggest that denial of certiorari may be given weight upon later application for *habeas corpus* in lower federal courts, but to refuse to be explicit. On the basis of this pronouncement, how are some 200 district judges to dispose of petitions for *habeas corpus* brought by State prisoners after denial of certiorari here? The opinion in effect invites them to take into consideration the prior denial here, but then threatens them with possible reversal for so doing.

The state of uncertainty in which the District Courts are left must lead to conflicting interpretations of our undisclosed meaning. Some judges will infer that denial

of certiorari bears on the exercise of *habeas corpus* jurisdiction. Others will feel they should adhere to this Court's old avowals concerning denial until they are told explicitly to the contrary. Most confusing of all, many judges, as is the way of judges, are unlikely to resolve the ambiguity decisively. Instead, they will take an equivocal position in denying a writ of *habeas corpus,* relying in part on the discretionary aspect of *habeas corpus* and in part on the fact that this Court denied certiorari. Such a disposition will either lead lawyers to be dubious about pressing an appeal, or, if the District Court's decision be appealed, such a blend of reasons in denying the writ is not likely to be overturned by a Court of Appeals, and it would be most natural for this Court not to grant certiorari to review such a case. The significance of a denial of certiorari given by the lower courts would not be presented in such an unentangled form as would commend itself according to normal criteria for a grant of certiorari. Adjudication by this Court of the specific issue will thus be greatly delayed. The result may well be that denial of certiorari would in practice attain a significance which the Court is unwilling to give it by candid adjudication.

It is, of course, one of our functions to resolve conflicts among the lower courts. But it is not our duty to stimulate such conflicts. Especially with regard to *habeas corpus* should we avoid such ambiguity. "The great writ of liberty" ought not to be treated as though we were playing a game. When a question affecting the *habeas corpus* jurisdiction of the District Courts is before us, it is our duty to guide the District Courts and not refuse to guide them. We cannot avoid an answer on the ground that the question is not before the Court. Opinions are required in our legal system in order that the reasoning which justifies a conclusion may be made manifest. The disclosure of the reasoning by which a

conclusion is reached cannot remotely be deemed dictum. A decision implies the process of reasoning which requires it. It is essential to be clear about what denial of certiorari means before determining whether a petition for certiorari is prerequisite to the exercise of *habeas corpus* jurisdiction by a District Court. Surely it is necessary to consider what a procedural requirement means before making it a requirement.

7. The significance of a denial of a petition for certiorari ought no longer to require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else. The State court's judgment is left undisturbed without any legal reinforcement whatever of the views which the State court expressed. Counsel at the bar have frequently been stopped for drawing comfort out of such a denial and the Court's opinions have indicated impatience with failure to recognize that the only thing that such a denial imports is that there were not four members of the Court who deemed it desirable, for their respective reasons, to review a decision of the lower court. Even before the Judiciary Act of 1925 so vastly extended this Court's certiorari jurisdiction, the Court said: "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver,* 260 U. S. 482, 490. This note of impatience has been sounded repeatedly.

The wholly negative meaning of a denial of certiorari is not so merely because we have said it. We have said it because it must be so unless the whole conception of certiorari in relation to the business of this Court is to be radically transformed. Such a revolutionary change cannot justifiably be taken in relation to one large group

of cases without drastic revision of the Court's treatment of such cases, with far-reaching consequences to the business of the Court and its proper discharge.

Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner. Petitions may have been denied because, even though serious constitutional questions were raised, it seemed to at least six members of the Court that the issue was either not ripe enough or too moribund for adjudication; that the question had better await the perspective of time or that time would soon bury the question or, for one reason or another, it was desirable to wait and see; or that the constitutional issue was entangled with nonconstitutional issues that raised doubt whether the constitutional issue could be effectively isolated; or for various other reasons not relating to the merits. Divergent and contradictory reasons often operate as to the same petition and lead to a common vote of denial. The want of explanations for denials of certiorari is in part due to the fact that a collective reason frequently could not be given. To suggest that a District Court can determine the significance to be attached to this Court's denial of certiorari by an examination of the record on certiorari here is to offer the District Courts darkness without Ariadne's thread. Particularly is this true in cases sought to be brought here from the State courts in which State and federal grounds are frequently entangled and an unambiguous federal question often does not emerge from the record.

To attach significance to a denial of a certiorari petition regarding the merits of the issues raised by the petition would be to transform a mechanism for keeping cases out of this Court into a means of bringing them in. It would

contradict all that led to the adoption of certiorari jurisdiction and would reject the whole course of the Court's treatment of such petitions, both in practice and profession. For if denial does import an expression of opinion upon the merits of the case, then we must deal with the merits of the case. During the last four fiscal years the District Courts throughout the country had annually from 500 to 600 *habeas corpus* cases brought by petitioners under State custody. To overrule *Wade* v. *Mayo* and to make it the duty of this Court to pass on the merits of anything like the number of these cases which would have to be brought here on petitions for certiorari from the State courts would throw an almost impossible burden upon the Court.[1]

8. We certainly ought not to condition the power of the local District Court to entertain a petition for *habeas corpus* on a prior denial of a petition for certiorari here if such denial carries no other significance than does the denial of certiorari in any other class of cases. Meaningless multiplication of steps in the legal process can hardly be deemed a virtue in judicial administration. Nor would it be more respectful of the dignity of a State court for the District Court to disagree with the State court's view of federal law if such disagreement came after this Court had denied certiorari rather than before.

It is suggested, however, that this Court should have the first opportunity to consider whether a State court

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[1] Judge Learned Hand has carried the requirement of eliciting a denial of a petition for certiorari in *habeas corpus* cases to its logical conclusion by giving such denial conclusive effect on the merits. *Schechtman* v. *Foster*, 172 F. 2d 339, 342–43. That is the logical conclusion of such a requirement—but it is the logic of unreality. For it flies in the face of the actualities of a denial. The considerations entering into such denials have necessitated the hitherto settled principle that denial carries no suggestion of adjudication on the merits.

was right in having denied a constitutional claim—what has been colloquially called a "first-crack" policy. The most weighty considerations of practical administration counsel against it. The burden of the Court's volume of business will be greatly increased, not merely because a greater number of certiorari petitions would be filed, but by reason of the effective pressure toward granting petitions more freely. For if the "first-crack" policy has any validity, it would require that every doubt be resolved in favor of granting certiorari, rather than leaving the case to the District Courts.

Moreover, State court decisions involving denial of federal claims made in collateral attack on a conviction are frequently decisions based merely on allegations in the pleadings. This Court can dispose of them only as a matter of abstract pleading. The District Courts, on the other hand, can hold hearings when deemed appropriate, consider allegations on their merits if they are at all substantial and dispose of what often turn out to be unmeritorious claims. Thus, the impact upon federal-State relationships of reversals of State court decisions, which this Court may not be able to avoid when it is limited to the pleadings, may well be avoided by lower federal courts, looking beyond paper allegations to the merits.

9. There is still another reason why it makes against, not for, sound administration of justice to bar exercise by a District Court of its *habeas corpus* jurisdiction merely because the discretionary power of this Court to review a State court decision has not been invoked. It is that cases involving federal claims by State prisoners so frequently involve questions of State law which must be answered before the federal issue can be reached. State questions are of two kinds: (1) Did the adverse State ruling exhaust the prisoner's available State rem-

edies? (2) May the State court's judgment be deemed to rest on some State ground?

Nothing stands out more prominently in the Court's experience with these cases than the doubts and difficulties in ascertaining the law controlling local practice and local remedies. Thus, according to the procedure of one State a constitutional issue like that in *Mooney* v. *Holohan, supra,* must be raised by *habeas corpus,* not *coram nobis,* while in another State only *coram nobis* is available, not *habeas corpus.* Although a State court may have felt that it wrote clearly, we may not be able to read clearly or at least in unison; some members of the Court read one way, some another. See, *e. g., New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688; *Morhous* v. *Supreme Court of New York,* 293 N. Y. 131, 56 N. E. 2d 79; *People* v. *Sadness,* 300 N. Y. 69, 89 N. E. 2d 188.

The difficulties in determining exhaustion of State remedies are illustrated by a litigation another stage of which was reached by denial of certiorari last Monday. *Hawk* v. *Nebraska,* 339 U. S. 923. At an earlier date, the Supreme Court of Nebraska had affirmed a denial of *habeas corpus* by the lower State court. *Hawk* v. *Olson,* 145 Neb. 306, 16 N. W. 2d 181. This Court granted certiorari and reversed on the merits, acting on the assumption that a federal right had been disregarded, 326 U. S. 271, despite our earlier statement in *Ex parte Hawk,* 321 U. S. 114, 116, to the effect that State remedies could not be deemed exhausted in Nebraska until *coram nobis* had been attempted. On the remand, the Nebraska Supreme Court advised us that we had misconceived its opinion and misunderstood local procedure—that it had not denied a federal claim out of hand but decided only that *habeas corpus* was not the proper procedural road to take in Nebraska. 146 Neb. 875, 22 N. W. 2d 136. Hawk then applied for a writ of *habeas corpus* in the federal District Court for Ne-

braska, but was told that he must first try *coram nobis* in the State courts. 66 F. Supp. 195, affirmed *sub nom. Hawk* v. *Jones,* 160 F. 2d 807. The district judge showed his knowledge of his local law, for when the federal claim was asserted by *coram nobis* it was heard on the merits, decided by a Nebraska trial court against the petitioner and affirmed by the Nebraska Supreme Court, *Hawk* v. *State,* 151 Neb. 717, 39 N. W. 2d 561.

The *Hawk* litigation illustrates the importance of the doctrine of exhaustion of State remedies. That doctrine is vital to the harmonious functioning of two judicial systems where one is subordinate to the other. But the litigation also shows that waste and friction are bound to be promoted if review of State court decisions in this field will have to come here initially. We are dealing with elusive and treacherous local legal materials which in their nature are not within the special competence of this Court. Such materials look one way if one examines only the dead letter of print. But to one brought up within the local system they carry meaning which never can be got from books. See *Diaz* v. *Gonzalez,* 261 U. S. 102, 106. The sure-footed manner in which the federal district judge dealt with Nebraska procedure in *Hawk* v. *Olson, supra,* indicates that he would not have made the error into which this Court fell. The Nebraska situation is representative of the difficulties and doubts that this Court has encountered again and again in regard to the local remedies available. The matter comes peculiarly within the rule of wisdom, often applied by this Court, whereby questions of local law and local practices will not be decided here but will be submitted to the knowledgeable views of federal judges in the various localities. See *Gardner* v. *New Jersey,* 329 U. S. 565, 583, and cases cited. This rule respects all the considerations that preclude intervention by a federal court until the State courts have fully acted.

Burke v. *Georgia,* 338 U. S. 941, is another admirable illustration of why we should not require cases raising a dubious constitutional question as to the validity of State convictions to be brought here before *habeas corpus* is sought in the District Courts. That we denied certiorari "without prejudice" to future proceedings in the District Court carried no legal significance.[2] The case merely demonstrates how frequently in this situation preliminary questions of State procedure and State court jurisdiction are involved. Instead of allowing these local issues to be canvassed initially in the District Courts, it is now proposed to deal with cases like *Burke* v. *Georgia* by requiring that they be brought here enveloped in the fog of State procedural law and then leaving it to the District Courts to lift the fog after we have concluded that it is too thick for us to pierce. Such procedure, I submit, would neither further the administration of justice nor be conducive to the proper use of this Court's time for the effective conduct of its inescapable business nor advance the self-esteem of State courts.

10. Nor need we be concerned lest the federal District Courts will lightly inject themselves into the State criminal process and open wide the State prison doors. Experience completely dispels such excogitated fears. The District Courts are presided over by judges who are citizens of the State, with loyalties to it no less strong than those of the judges of the State courts. Judges often come to the federal courts from the State courts. The proof of the pudding is in the eating. The showing is overwhelming that the District Courts grant writs of *habeas corpus* most sparingly and only with due re-

[2] The considerations that lead to an explicit statement that denial of certiorari is "without prejudice" to other avenues of relief because it does not bear on the merits of course carry no negative implication that in the absence of such a phrase the denial is with prejudice.

gard for this Court's decisions under the Due Process Clause.[3]

Even though a petition for *habeas corpus* in a federal District Court may involve constitutional questions which were found against the petitioner by the highest court of his State, the District Court is not sitting as a court of review of the State court. A petition for *habeas corpus* in a federal court, after the State process has been exhausted, "comes in from the outside," as Mr. Justice Holmes phrased it in his dissenting opinion in *Frank* v. *Mangum,* 237 U. S. 309, 345, 346, a view which established itself as law in *Moore* v. *Dempsey,* 261 U. S. 86. If it be suggested that as a matter of appearance, legal analysis apart, a federal District Court might be granting relief which the highest court of the State had denied, the same unanalyzed appearance would attach to a District Court's granting relief after this Court had denied it.

11. Due regard for State and federal relations as expressed in the doctrine of exhaustion of State remedies and adherence to the function played by certiorari in the business of this Court combine to reject as erroneous the notion that federal District Courts are to be barred from exercising their *habeas corpus* jurisdiction if certiorari was

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[3] The Administrative Office of the United States Courts has compiled the following statistics:

Fiscal Years	1945–46	1946–47	1947–48	1948–49
Habeas corpus cases involving State prisoners disposed of by District Courts	503	481	487	610
Cases in which petitioners were successful	14	13	11	10
Percentage of cases in which petitioners were successful	2.8%	2.7%	2.3%	1.6%

See Speck, *Statistics on Federal Habeas Corpus,* 10 Ohio State L. J. 337, 357 (1949).

not first sought here. The error derives from the assumption that a petition for certiorari to this Court was included in the "State remedies available" which must be exhausted before a federal court can entertain a writ of *habeas corpus*. This assumption appears for the first time in a *per curiam* opinion in *Ex parte Hawk*, 321 U. S. 114, 117. It was repeated, though not in issue, in the *per curiam* in *White* v. *Ragen*, 324 U. S. 760, 764. A consideration of what actually was said in *Ex parte Hawk* on this matter makes it perfectly clear how the misconception about certiorari in relation to the District Court's jurisdiction in *habeas corpus* crept into *Ex parte Hawk*. The following is everything contained in *Ex parte Hawk* on the subject:

> "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. *Tinsley* v. *Anderson*, 171 U. S. 101, 104–5; *Urquhart* v. *Brown*, 205 U. S. 179; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13; *Mooney* v. *Holohan*, *supra*, 115; *Ex parte Abernathy*, 320 U. S. 219." 321 U. S. at 116–17.

The essence of this statement is the doctrine of exhaustion of State remedies. Two of the citations—*Mooney* v. *Holohan* and *Ex parte Abernathy*—have only that relevance. The three other citations—*Tinsley* v. *Anderson; Urquhart* v. *Brown; United States ex rel. Kennedy* v. *Tyler*—are directed to the particularization in the main statement as to the exhaustion of "all state remedies available, including all appellate remedies . . . in this Court . . . ." These three cases illustrate a series of decisions in this Court holding that a lower federal court

ordinarily ought not to exercise its jurisdiction in *habeas corpus* in favor of one in State custody even after a final determination by the highest court of a State unless he has availed himself of his remedy "to review it by writ of error from this court." *Tinsley* v. *Anderson,* 171 U. S. 101, 105.

Of course. A writ of error was a writ of right. It makes all the difference in the world whether a prisoner knocks at the door of this Court to invoke its grace or has unquestioned access for the final determination of the federal question as to which the highest court of the State was merely an intermediate tribunal. The latter was the situation in the three cases cited in *Ex parte Hawk.* In the writ of error cases this Court held *habeas corpus* in the lower federal courts ought not to take the place of a mandatory appeal. *Markuson* v. *Boucher,* 175 U. S. 184.

But this jurisdictional situation was drastically changed by the Act of September 6, 1916, 39 Stat. 726, and the Act of February 13, 1925, 43 Stat. 936. The whole purport of this transforming jurisdictional legislation was to bar the door of this Court to litigation like this flood of *habeas corpus* cases. After this shift from review as of right to review by grace, it could no longer be said that a litigant forwent his right to have this Court review and reverse a State court. The right was gone. Only an opportunity—and a slim one—remained. It completely misconceives the doctrine which required a case to be brought to this Court by writ of error, because it was the duty of this Court to adjudicate the claim on the merits, to apply it to the totally different factors involved in certiorari. All the considerations of policy required that the process of constitutional adjudication through writ of error be exhausted before a lower federal court could step in. Until *Ex parte Hawk* there was no suggestion of assimilating certiorari to the writ of error

doctrine. In the present context of the Court's business in relation to these cases—their volume and the required knowledge of local law with which the local federal judges are much more familiar than we can possibly be—all considerations of policy urge against requiring certiorari to be filed and denied before the District Court may be allowed to exercise jurisdiction.

The reasons underlying *stare decisis* are not applicable to such a procedural suggestion as *Ex parte Hawk* made regarding the requirement of petitioning this Court for certiorari before evoking the District Court's jurisdiction on *habeas corpus*. That suggestion never was translated into practice so far as the records of this Court disclose. What was specifically decided in *Ex parte Hawk* did become the practice of this Court—that is, petitions for leave to file a writ of *habeas corpus* in this Court under § 262 of the Judicial Code, now 28 U. S. C. § 1651, were thereafter denied. But no instance has been revealed in which this Court acted on the suggestion that exhaustion of State remedies includes denial of certiorari here. Apart from the fact that *Wade* v. *Mayo* displaced the inclusion of certiorari as part of the State remedies, it was recognized at the last term of Court that the scope of *Ex parte Hawk* was that it expressed the "doctrine of exhaustion of state remedies." *Young* v. *Ragen,* 337 U. S. 235, 238.

12. A final point remains and that is the suggestion that the provision of the 1948 revision of the Judicial Code requires adherence to what was said in *Ex parte Hawk* about resort to certiorari. The Code provisions say no such thing nor do the Reviser's notes. Section 2254 of Title 28 merely formulates the judicial doctrine first announced by this Court in *Ex parte Royall,* 117 U. S. 241—the doctrine of exhaustion of State remedies:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears

> that the applicant has exhausted the remedies available in the courts of the State . . . .
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Wade v. *Mayo* made it clear that certiorari is not a remedy "available in the courts of the State" and no claim is now made to the contrary. With that abandonment goes the uncritical inclusion by *Ex parte Hawk* of certiorari among the remedies of the State. *Wade* v. *Mayo,* to be sure, could not have been before the Congress, but the Reviser characterized § 2254 as "declaratory of existing law as affirmed by the Supreme Court," adding "See Ex parte Hawk." That decision is sound enough in its essential requirement for "exhaustion of State remedies." The slip in analysis it contained as to what are "State remedies" is surely not the equivalent of an enactment by Congress. A far more persuasive case for finding reenactment by Congress of a decision of this Court was rejected in *Girouard* v. *United States,* 328 U. S. 61.

13. In short, the decision reached today has alternative consequences neither of which, I respectfully submit, can be justified. In barring a District Court from entertaining a petition for *habeas corpus* on behalf of a State prisoner prior to denial of certiorari here, the decision must mean either (1) that denial of a petition for certiorari in this class of cases, unlike denials in all other classes of cases, would serve the purpose of an adjudication on the merits, thereby carrying with it all the weight that an adjudication on the merits by this Court should carry with a District Court even in *habeas corpus* cases, or (2) that such a denial, as is true of denials in any other type of case, has no legal significance.

The first alternative—that in *habeas corpus* cases denial of certiorari has the effect of a disposition on the merits—would require a complete change in our consideration of such petitions by this Court. They would have to be treated as we now treat cases in which a petition for certiorari is granted so as to be heard on the merits. This would cast a new burden upon the Court full of the direst consequences to the proper disposition of the rest of the business of the Court. In addition, if denial of certiorari as though on the merits but without full dress consideration would, for all effective purposes, preclude resort to the District Courts on a claim that State custody is in violation of the Constitution, it would judicially nullify the *habeas corpus* jurisdiction which was first given to the lower federal courts by the Act of February 5, 1867, and has ever since been retained. On the second alternative, *i. e.*, that denial of certiorari in *habeas corpus* cases is like any other denial of certiorari, the Court would announce that a meaningless step in this Court is an indispensable preliminary to going to the local District Court.

I agree with the opinion of Judge Phillips below that the case should be reversed and remanded to the District Court.

MR. JUSTICE JACKSON, being of the opinion that this is the better of the two unsatisfactory courses open to us, joins this opinion.

SLOCUM, GENERAL CHAIRMAN, LACKAWANNA DIVISION NO. 30, ORDER OF RAILROAD TELEGRAPHERS, *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 391. Argued February 8, 1950.—Decided April 10, 1950.

1. A railroad had separate collective-bargaining agreements with two labor unions. A dispute arose between the two unions concerning the scope of their respective agreements, each claiming for its members certain jobs with the railroad. The claims were pursued in "the usual manner" under § 3 First (i) of the Railway Labor Act, without reaching an adjustment. Instead of invoking the jurisdiction of the Adjustment Board, the railroad filed a declaratory judgment action in a state court, naming both unions as defendants. After a trial, the state court interpreted the agreements and entered a declaratory judgment. *Held:* Under § 3 of the Railway Labor Act, the jurisdiction of the Adjustment Board to adjust grievances and disputes of the type here involved is exclusive, and the state court erred in interpreting the agreements and entering a declaratory judgment. Pp. 240–245.
2. The rationale of *Order of Conductors* v. *Pitney,* 326 U. S. 561, holding that federal courts should not interpret a carrier-union collective agreement prior to an interpretation of such agreement by the Adjustment Board, equally supports a denial of power to a state court to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act. *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630, distinguished. Pp. 243–245.

299 N. Y. 496, 87 N. E. 2d 532, reversed.

A railroad brought a declaratory judgment action in a New York state court, naming as defendants two labor unions with which it had separate collective-bargaining agreements. The state court interpreted the agreements and entered a declaratory judgment, which was affirmed by the Appellate Division, 274 App. Div. 950, 83 N. Y. S. 2d 513, and the Court of Appeals, 299 N. Y. 496, 87 N. E. 2d 532. This Court granted certiorari. 338 U. S. 890. *Reversed and remanded,* p. 245.

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Leo J. Hassenauer and *Manly Fleischmann* argued the cause and filed a brief for petitioner.

Pierre W. Evans argued the cause for respondent. With him on the brief was *Rowland L. Davis, Jr.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board to hold hearings, make findings, and enter awards in all disputes between carriers and their employees "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ."[1] The question presented is whether state courts have power to adjudicate disputes involving such interpretations when the Adjustment Board has not acted.

The respondent railroad has separate collective-bargaining agreements with the Order of Railroad Telegraphers and the Brotherhood of Railway Clerks.[2] A dispute arose between the two unions concerning the scope of their respective agreements. Each claimed for its members certain jobs in the railroad yards at Elmira, New York. The railroad agreed with the Clerks Union. The chairman of Telegraphers protested, urging reassignment of the work to members of his union and claiming back pay on behalf of certain individual members. The claims were pursued in "the usual manner" required by § 3 First (i) of the Railway Labor Act, 45 U. S. C. § 153 First (i), as a prerequisite to invoking jurisdiction of the Adjustment Board.[3] That section further provides that,

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[1] 48 Stat. 1185, 1189–1193, 45 U. S. C. § 153.

[2] The full name of the latter union is Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

[3] "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules,

"failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . . ."

Instead of invoking the jurisdiction of the Adjustment Board, the railroad filed this action for declaratory judgment in a New York state court, naming both unions as defendants. It prayed for an interpretation of both agreements, and for a declaration that the Clerks' agreement, not the Telegraphers', covered the jobs in controversy. It also asked for a declaration that the Telegraphers must refrain from making similar claims under its bargaining agreement. Telegraphers moved to dismiss the case on the ground that the Railway Labor Act left the state court without jurisdiction to interpret the contracts and adjudicate the dispute. That motion was denied. After a trial, the court interpreted the contracts as the railroad had urged, and entered the requested declarations. This judgment was affirmed by the Court of Appeals of New York, two judges dissenting. 299 N. Y. 496, 87 N. E. 2d 532.[4] The majority thought that our opinion in *Moore* v. *Illinois Central R. Co.*, 312 U. S.

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or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 48 Stat. 1191.

[4] The Appellate Division of the Supreme Court (3d Dept.) also affirmed both the order of the trial court denying the motion to dismiss, 269 App. Div. 467, 57 N. Y. S. 2d 65, and the subsequent judgment on the merits, 274 App. Div. 950, 83 N. Y. S. 2d 513. An opinion of the New York Supreme Court denying petitioner's motion to remove the action to the United States District Court is reported at 183 Misc. 454, 50 N. Y. S. 2d 313. The opinion of the United States District Judge remanding the case to the state court is reported in 56 F. Supp. 634.

630, left state courts free to adjudicate disputes arising out of a carrier-union collective agreement without obtaining the Board's interpretation of that agreement. The dissenting judges, however, relied on *Order of Conductors* v. *Pitney,* 326 U. S. 561, where we held that federal courts should not interpret such agreements prior to interpretation by the Adjustment Board. They asserted that this rule was also applicable in state courts. We granted certiorari to consider these questions. 338 U. S. 890.

The first declared purpose of the Railway Labor Act is "To avoid any interruption to commerce or to the operation of any carrier engaged therein." 48 Stat. 1186 (§ 2), 45 U. S. C. § 151a. This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements. See *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 722. The plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes. Carriers are therefore required to negotiate with bargaining representatives of the employees. *Virginian R. Co.* v. *Federation,* 300 U. S. 515, 547, 548. The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail.

In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties. This type of grievance has long been considered a potent cause of friction leading to strikes. It was to prevent such friction that the 1926 Act provided for creation of various Adjustment Boards by voluntary agreements between carriers and workers. 44 Stat. 578. But this voluntary machinery proved unsatisfactory, and

in 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a national Adjustment Board composed of representatives of railroads and unions.[5] 48 Stat. 1189–1193. The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon.[6] Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems.

The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in *Order of Conductors* v. *Pitney, supra.* There we held, in a case remarkably similar to the one before us now, that the Federal District Court in its equitable discretion should have refused "to adjudicate a jurisdictional dispute

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[5] "These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties." H. R. Rep. No. 1944, 73d Cong., 2d Sess. 3.

[6] For an interesting discussion of the Act's history and purposes, see Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 Yale L. J. 567 *et seq.*

involving the railroad and two employee accredited bargaining agents . . . ." Our ground for this holding was that the court "should not have interpreted the contracts" but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S. at 567–568. This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act.

Our holding here is not inconsistent with our holding in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board.

We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive.[7] The holding of the *Moore* case does not conflict

[7] We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192. Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction.

with this decision, and no contrary inference should be drawn from any language in the *Moore* opinion. It was error for the New York courts to uphold a declaratory judgment interpreting these collective-bargaining agreements. The judgment of the New York Court of Appeals is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE REED, dissenting.

The Court denies "power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." It says "that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive." Read literally, this language would indicate that the Court holds that the Board in most cases not only has exclusive jurisdiction for the institution of proceedings to determine rights under railroad collective-bargaining agreements, but also for their final determination, *i. e.*, that there is no judicial review of the Board's awards, except those for money. The Court, however, in note 7 states that it is not "called upon to decide any question concerning judicial proceedings to review board action or inaction." From this I take it that the Court means only to hold that the Board has what might be called exclusive primary jurisdiction and that the decision is to have no implications for later cases which might pose the issue of judicial review of Board "action or inaction." [1] Never-

[1] The sections of the statute which bear on appealability are 48 Stat. 1191, § 3 First (m) and (p). See *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, dissent, 761.

theless I think the Court's decision lacks statutory basis, and I dissent from its opinion and judgment.

Since the Court's decision will be referred to as a precedent for solving administrative jurisdiction problems, it seems worth while to set out my reasons for disagreeing with the Court's opinion. We can foresee only a part of the complications that this ruling of exclusive primary jurisdiction may bring into the administration of the Railway Labor Act. The determination of what adjudicatory body has power to judge a controversy is basic to all litigation. Jurisdiction that has always been recognized to exist in state courts should not be taken from them by inference drawn with difficulty from the statute by this Court after contrary conclusions by two state courts.[2] The passage of a federal law creating a forum for the enforcement of certain contract rights connected with commerce does not necessarily withdraw from state courts their recognized jurisdiction over these contract controversies. The purpose to limit enforcement to the federal forum must be found in the federal statute in express words or necessary implication.[3]

The Court calls attention to nothing to supply these requisites. There is not a line in the statute, and so far as I can ascertain, not a suggestion in the hearings that the creation of the Adjustment Board was intended by Congress to close the doors of the courts to litigants with otherwise justiciable controversies. The only expression in the statute which might conceivably support the Court is the general declaration of the Act's purpose "to provide for the prompt and orderly settlement of all disputes

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[2] *Delaware, L. & W. R. Co.* v. *Slocum,* 299 N. Y. 496, 87 N. E. 2d 532; *Southern R. Co.* v. *Order of Railway Conductors,* 210 S. C. 121, 41 S. E. 2d 774. See also *Adams* v. *New York, C. & St. L. R. Co.,* 121 F. 2d 808.

[3] Cf. *United States* v. *Bank of New York Co.,* 296 U. S. 463, 479; see *Claflin* v. *Houseman,* 93 U. S. 130, 136.

growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." [4] But this expression is as consistent with an intention to provide an alternative forum as to provide an exclusive one. Experience has not demonstrated that the settlement of grievances has been any the less prompt and orderly in the courts than it has been in the Board.[5]

Neither the Act nor our precedents support the Court's ruling. In the section which conferred jurisdiction on the Board, § 3 First (i), Congress provided that disputes "shall" be first handled by negotiations between the parties and on their failure "may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . . ." [6] The use of "may"and "shall" in the 1934 Railway Labor Act may not be decisive, but I fail to see how it can now be disregarded completely, when at the time of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, the use of "may" seemed an indication of congressional purpose sufficient to furnish

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[4] 48 Stat. 1187, § 2 (5).

[5] See Fifteenth Annual Report of the National Mediation Board, p. 12; Monograph of the Attorney General's Committee on Administrative Procedure, Part 4, Railway Labor, p. 16, S. Doc. No. 10, 77th Cong., 1st Sess. (1941).

[6] 48 Stat. 1191, § 3 First (i):

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

a ground for holding that courts had concurrent primary jurisdiction.[7]

The ruling in *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, does not support today's decision. In that case this Court held repugnant to the Interstate Commerce Act a suit in a state court to recover unreasonable carrier charges. The Act had given the Commission power to determine the reasonableness of rates filed and published under its provisions. It also prohibited explicitly preferences and discriminations in favor of shippers. The Court held that, if a shipper could recover in the courts part of a tariff charge, he would receive a discriminatory preference. Since this would be wholly inconsistent with the Interstate Commerce Act, state courts were without jurisdiction to entertain suits for the recovery of unreasonable charges.[8] By necessary inference

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[7] 312 U. S. 630, 635–36: "It is to be noted that the section pointed out, § 153 (i), as amended in 1934, provides no more than that disputes 'may be referred . . . to the . . . Adjustment Board . . .' It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . .' This difference in language, substituting 'may' for 'shall,' was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."

[8] 204 U. S. 426, 440–41: "For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to

the Commission was found to have the sole power to entertain originally proceedings which might result in the alteration of an established schedule. But the Court was careful to say that a statute was not to be construed as taking away a common-law right unless it were found that it was "so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy." [9] The Railway Labor Act has no rule of law, similar to that against preferences, that would be controverted if different courts in different states should construe identical collective-bargaining agreements differently. If, to preserve uniformity in the rulings of the Board, it were necessary that it have exclusive primary jurisdiction over grievance disputes, Congress would hardly have provided, as it did, that carriers and railroads by agreement might set up system and regional boards independent of the National Board.[10] The *Abilene* case was pressed by four dissenters as controlling authority

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consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed."

[9] 204 U. S. 426, 436–37: "As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preëxisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

[10] 48 Stat. 1193, § 3 Second.

to compel the conclusion that the Board had exclusive jurisdiction in *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711.[11] But on the tacit assumption that courts were not ousted of their jurisdiction, we upheld the right of employees to sue the carrier although the employment relationship still existed.

The case before us is quite different from *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297, and *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323. Those concerned controversies of a kind unfamiliar to courts, and they involved the Mediation Board, which could impose sanctions only when the parties agreed to accept its awards.[12] We held that the issues in those cases were not justiciable in the federal courts, since the "concept of mediation is the antithesis of justiciability." [13] Here, the controversy relates to the interpretation of contracts, a function courts have always performed, and "it is not

[11] 325 U. S. 711, dissent, 759. The dissenters insisted, p. 760: "The considerations making for harmonious adjustment of railroad industrial relations through the machinery designed by Congress in the Railway Labor Act are disregarded by allowing that machinery to be by-passed and by introducing dislocating differentiations through individual resort to the courts in the application of a collective agreement."

[12] 48 Stat. 1195, § 5 First; 44 Stat. 584, § 8.

[13] *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323, 337. Not long after these decisions were handed down we explained them as follows: "This result was reached because of this Court's view that jurisdictional disputes between unions were left by Congress to mediation rather than adjudication. 320 U. S. 302 and 337. That is to say, no personal right of employees, enforcible in the courts, was created in the particular instances under consideration. 320 U. S. 337. But where rights of collective bargaining, created by the same Railway Labor Act, contained definite prohibitions of conduct or were mandatory in form, this Court enforced the rights judicially. 320 U. S. 330, 331. Cf. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515." *Stark* v. *Wickard,* 321 U. S. 288, 306–307. See *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, 207.

to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue." [14]

Nor did *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561, determine the present jurisdictional issue. In a federal bankruptcy court handling a railroad reorganization, an interpretation of a collective-bargaining agreement was sought. We declared that the federal equity court should "exercise equitable discretion to give [the National Railroad Adjustment Board] the first opportunity to pass on the issue." [15] Thus we determined only that under the circumstances of that case the District Court, as a matter of discretion, should have remanded to the Board a controversy over the meaning of the collective-bargaining agreement, and at the same time should have retained jurisdiction to apply the Board's interpretation to the controversy. There was no intimation that the obligation to send the controversy to the Board was any more universal than the obligation of an equity court to sometimes remit parties to the state courts for a preliminary decision on state law.[16] There was no ruling that Congress had deprived the District Court of jurisdiction. Today the Court is compelled to extend the *Pitney* precedent from "discretion" to "jurisdiction" because federal courts lack power to order state courts to exercise in a particular manner their equitable discretion. But the Court's inability to secure a flexible rule does not warrant the Court to impose on the state courts a rigid one.

Congress surely would not have granted this exclusive primary power to adjudicate contracts to a body like the Board. It consists of people chosen and paid, not by the Government, but by groups of carriers and the

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[14] *Stark* v. *Wickard,* 321 U. S. 288, 309.

[15] *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561, 567.

[16] *Ibid.;* cf. *Propper* v. *Clark,* 337 U. S. 472; *Meredith* v. *Winter Haven,* 320 U. S. 228.

large national unions.[17] Congress has furnished few procedural safeguards. There is no process for compelling the attendance of witnesses or the production of evidence. There is no official record, other than that of the informal pleadings. Hearings are conducted without witnesses.[18] The Board has operated without giving individuals a chance to be heard unless they were represented by unions.[19]

Throughout this opinion I have assumed that the Court means only to impose a requirement of primary recourse to the Board. But that inevitably means many litigants would be deprived of access to the courts. The extent of judicial review of awards other than money awards is doubtful, and it is highly questionable whether even a money award can be reviewed in the courts if only the carrier wishes review.[20] Most important, the statute provides no relief for a petitioning party—be he union, individual or carrier—against an erroneous order of the Board.[21] This Court may be hard put to protect the rights of minorities under these circumstances.[22]

Nevertheless the Court says that Congress has forced the parties into a forum that has few of the attributes

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[17] 48 Stat. 1189, § 3 First (a) (b) (c) (g).

[18] Monograph, n. 5, *supra*, pp. 11–14; see Garrison, National Railroad Adjustment Board, 46 Yale L. J. 567, 576 *et seq.*

[19] Monograph, n. 5, *supra*, p. 7.

[20] See *Washington Terminal Co.* v. *Boswell*, 75 U. S. App. D. C. 1, 12, 124 F. 2d 235, 246; affirmed by an equally divided court, 319 U. S. 732.

[21] 48 Stat. 1191, § 3 First (m) and (p). Garrison, National Railroad Adjustment Board, 46 Yale L. J. 567, 591.

[22] See *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 206. Compare *Howard* v. *Thompson*, 72 F. Supp. 695; *State ex rel. St. Louis-S. F. R. Co.* v. *Russell*, 358 Mo. 1136, 219 S. W. 2d 340; *Edwards* v. *Capital Airlines*, 84 U. S. App. D. C. 346, 350, 176 F. 2d 755, 759 *et seq.* Cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177.

of a court, but which may be the final judge of the rights of individuals. Our duty as a court does not extend to a determination of the wisdom of putting a solution of industry problems into the hands of industry agencies so far as the Constitution will permit.[23] Some may deem it desirable to weld various industries or professions into self-governing forms, completely free from judicial intervention. This desire may spring from a conviction that experience and training in highly specialized fields give the members of a group that understanding and capacity which will enable them to govern their internal affairs better than would courts dealing with the generality of human relations and only occasionally with these specialized controversies. Congress, however, has never completely so isolated an industry from the rest of the Nation. There is too much interrelation and interdependence between such groups and the rest of the population. In some instances the Congress has given great sweep to agencies in some fields. Even special courts have been created, such as the Court of Customs and Patent Appeals. When Congress has created these administrative agencies and special courts, it has carefully outlined their powers, provided stated protections for individual rights, and has furnished neutral officials. But here, although none of these protections have been provided, the Court finds an underlying purpose in Congress to abolish, without discussion, judicial jurisdiction.

When an administrative body varies so markedly from the kind which experience has shown may safely be given final power over people's rights, it should not be assumed that Congress intended the primary jurisdiction of the Board to be exclusive. A more definite expression is required. The decision of the Court places it in a dilemma

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[23] See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284; *Ng Fung Ho* v. *White*, 259 U. S. 276.

of its own creation—it must in the future build up a complex system of review, or it must say that Congress intended to leave the rights of many individuals and organizations to the unreviewable discretion of a privately selected board. By giving effect to the plain words of the statute which confer on the Board a jurisdiction only concurrent with the courts, we should avoid the necessity for judicial legislation in unexplored areas of the law. If unseemly results should follow, the legislative body would have the facilities to undertake the important and extensive task of deciding what should be the proper distribution of authority between courts and administrative bodies in connection with railroad labor relations. Courts should await specific legislative direction instead of reading into a statute a purpose to transfer jurisdiction from state courts to a federal board.

ORDER OF RAILWAY CONDUCTORS OF AMERICA *v.* SOUTHERN RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 438. Argued February 8–9, 1950.—Decided April 10, 1950.

A dispute arose between a railroad and a labor union as to the railroad's obligation under their collective-bargaining agreement to give conductors extra pay for certain services. The railroad refused the demand of the union and commenced a declaratory judgment action in a state court. The union thereafter filed a petition for hearing and award before the Adjustment Board under the Railway Labor Act. *Held:* The state court was without power to interpret the terms of the agreement and adjudicate the dispute. *Slocum* v. *Delaware, L. & W. R. Co., ante,* p. 239. Pp. 255–257.
215 S. C. 280, 54 S. E. 2d 816, reversed.

In a declaratory judgment action brought by a railroad against a labor union, for adjudication of a dispute arising out of a collective-bargaining agreement between them, a state court interpreted the agreement and entered a declaratory judgment. The State Supreme Court affirmed. 215 S. C. 280, 54 S. E. 2d 816. This Court granted certiorari. 338 U. S. 899. *Reversed and remanded,* p. 257.

V. C. Shuttleworth argued the cause for petitioner. With him on the brief were *Harry E. Wilmarth* and *Frederick H. Horlbeck.*

W. S. Macgill argued the cause for respondent. With him on the brief were *Nath B. Barnwell, Frank G. Tompkins, Henry L. Walker* and *Sidney S. Alderman.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises the same statutory question as *Slocum* v. *Delaware, L. & W. R. Co., ante,* p. 239. The petitioner, Order of Railway Conductors, is the only accredited bargaining representative of conductors employed by the re-

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spondent Southern Railway. A dispute arose between certain conductors and the railroad concerning the railroad's obligation under the collective-bargaining agreement to give conductors extra pay for certain services. The claims of the conductors were referred to the union, which sought by negotiation to persuade the railroad to pay. The railroad refused, and thereafter prayed a South Carolina state court for a declaratory judgment interpreting the agreement as not requiring the claimed payments. The trial court first refused to exercise jurisdiction. Citing *Order of Conductors* v. *Pitney,* 326 U. S. 561, it held that state courts, like federal courts, should leave settlement of such disputes to the National Railroad Adjustment Board. The State Supreme Court reversed, holding that the state court did have power to interpret the bargaining agreement and adjudicate the dispute. 210 S. C. 121, 41 S. E. 2d 774. After a lengthy trial the lower court held that the collective agreement did not require the compensation sought by the conductors and entered the declaratory judgment requested. The Supreme Court affirmed. 215 S. C. 280, 54 S. E. 2d 816.

For reasons set out in the *Slocum* case, *ante,* p. 239, we hold that the South Carolina state court was without power to interpret the terms of this agreement and adjudicate the dispute. We discuss this case separately because it sharply points up the conflicts that could arise from state court intervention in railroad-union disputes. After the railroad had sued in the state court, the union filed a petition for hearing and award before the Adjustment Board. The state court nevertheless proceeded to adjudicate the dispute. Sustaining the state court's action would invite races of diligence whenever a carrier or union preferred one forum to the other. And if a carrier or a union could choose a court instead of the Board, the other party would be deprived of the privilege conferred by § 3 First (i) of the Railway Labor Act, 48

Stat. 1191, 45 U. S. C. § 153 First (i), which provides that after negotiations have failed "either party" may refer the dispute to the appropriate division of the Adjustment Board.

The judgment of the South Carolina Supreme Court is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REED is of the view that the decision below should be affirmed for the reasons set out in his dissent in *Slocum* v. *Delaware, L. & W. R. Co., ante,* p. 245.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MORFORD *v.* UNITED STATES.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 236. Decided April 10, 1950.

Petitioner, who is Executive Director of the National Council of American-Soviet Friendship, Inc., was convicted in the District of Columbia of violating R. S. § 102, 2 U. S. C. § 192, by willfully refusing to produce certain documents before the Committee on Un-American Activities of the House of Representatives in compliance with a subpoena duly served upon him. On *voir dire* examination, counsel for petitioner was not permitted to question government employees on the jury panel with specific reference to the possible influence of Executive Order 9835, the so-called "Loyalty Order," on their ability to render a just and impartial verdict; and four government employees were permitted to serve on the jury over his objection. *Held:* The conviction is reversed because of this denial of an opportunity to prove actual bias on the part of the government employees who served on the jury. P. 259.

85 U. S. App. D. C. 172, 176 F. 2d 54, reversed.

Petitioner, who is Executive Director of the National Council of American-Soviet Friendship, Inc., was indicted in the District of Columbia for violating R. S. § 102, 2 U. S. C. § 192, by willfully refusing to produce certain documents before the Committee on Un-American Activities of the House of Representatives in compliance with the subpoena duly served upon him. Four government employees served on the jury over his objection, and he was convicted. The Court of Appeals affirmed. 85 U. S. App. D. C. 172, 176 F. 2d 54. *Certiorari granted and conviction reversed,* p. 259.

Abraham J. Isserman, David Rein and *Joseph Forer* for petitioner.

Solicitor General Perlman, Assistant Attorney General Campbell and *Robert S. Erdahl* for the United States.

Briefs of *amici curiae* supporting petitioner were filed by *William L. Standard* for the Committee for a Democratic Far Eastern Policy and for the Congress of American Women; *Victor Rabinowitz, Nathan Witt* and *Leonard B. Boudin* for the American Communications Association (CIO) et al.; *Leo J. Linder* for the Methodist Federation for Social Action; *Lester M. Levin* for the National Council of the Arts, Sciences and Professions; and *John J. Abt* for the Progressive Party of America et al.

PER CURIAM.

In this case the trial court did not permit counsel for petitioner to interrogate prospective government employee jurors upon *voir dire* examination with specific reference to the possible influence of the "Loyalty Order," Executive Order No. 9835, on their ability to render a just and impartial verdict. Such questioning was permitted in *Dennis* v. *United States, ante,* p. 162; see n. 4 of the Court's opinion, *ante,* pp. 170–171.

We said in *Dennis* that "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Ante,* pp. 171–172. Since that opportunity was denied in this case, the petition for writ of certiorari is granted and the judgment of the Court of Appeals is reversed.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER concur in the reversal for the reasons expressed in their opinions in *Dennis* v. *United States, ante,* p. 162.

MR. JUSTICE DOUGLAS concurs in the reversal of the judgment. Since, however, counsel requested that all

government employees be excluded from the jury in these cases, he thinks the request should have been granted for the reasons stated by the dissenting Justices in *Frazier* v. *United States,* 335 U. S. 497, and in *Dennis* v. *United States, ante,* p. 162.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

UNITED STATES *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 26. Argued October 13–14, 1949.—Decided April 17, 1950.

The United States condemned certain premises for use by the Army for a term initially ending June 30, 1943, with an option to renew for additional periods during the existing national emergency. Respondent was lessee of a portion of the premises for a term expiring October 31, 1944, and incurred expenses for the removal of its personal property. Subsequently, the Government extended its occupancy for two additional yearly periods ending June 30, 1945. *Held:* Although the occupancy taken by the United States was initially for a period less than the remainder of respondent's term, respondent's removal expenses are not relevant in determining just compensation, since respondent's term had been exhausted by the Government's occupancy. Pp. 262–268.

(a) When there is an entire taking of a condemnee's property, be it a leasehold or a fee, the expenses of removal or relocation are not to be included in valuing what is taken. P. 264.

(b) Where the Government initially takes an occupancy for less than the outstanding term of a lease but later exercises a renewal option so as to exhaust the entire lease, this should be treated as a taking of the whole lease. Pp. 265–268.

(c) Where the Government initially takes an occupancy for less than the outstanding term of a lease with an option for extension, an award based on removal costs should be delayed until it is known whether the Government's occupancy has exhausted the tenant's leasehold. P. 268.

170 F. 2d 752, reversed.

The District Court awarded respondent compensation for the expense of removing personal property from leased premises condemned by the Government. 71 F. Supp. 1001. The Court of Appeals affirmed. 170 F. 2d 752. This Court granted certiorari. 336 U. S. 950. *Reversed,* p. 268.

Roger P. Marquis argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Vanech* and *Oscar H. Davis.*

Milton J. Donovan argued the cause and filed a brief for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On February 18, 1943, the United States filed a petition in the United States District Court for the District of Massachusetts to condemn certain land and buildings in Springfield, Massachusetts, for use by the Army for a term initially ending June 30, 1943, with a right to renew for additional yearly periods during the existing national emergency, at the election of the Secretary of War.[1] On the same day the District Court authorized the United States to take immediate possession. The respondent, Westinghouse Electric and Manufacturing Company, was lessee of a portion of the condemned property, using it as a warehouse, under a lease dated January 19, 1942, for a term expiring on October 31, 1944. Respondent, in order to comply with the District Court's order of immediate possession, incurred expenses for the removal of its personal property. Subsequently, the Secretary of War exercised his right of renewal and extended the Government's occupancy for two additional yearly periods ending on June 30, 1945. Thus, although the

[1] The petition was filed under § 201 of Title II of the Second War Powers Act of 1942, 56 Stat. 176, 177, 50 U. S. C. App. § 632. This section authorized certain officials "to acquire by condemnation, any real property, temporary use thereof, or other interest therein," for purposes related to the war. Plainly it conferred power to condemn interests in realty normally purchased by private persons, including, of course, options to renew.

occupancy taken by the United States was initially for a period less than the remainder of respondent's term, the renewals eventually exhausted respondent's leasehold.

At the time of the initial taking as well as upon each yearly extension, sums were deposited into the District Court as estimated just compensation. It was stipulated that these sums represented the fair market value of the bare, unheated warehouse space taken, leaving open the question whether, as a matter of law, the removal costs incurred by the respondent were to be taken into account in computing just compensation for what was condemned. It was further stipulated that the removal expenses were both reasonable and necessary, and that, taking such removal costs into account, the market rental value of the premises was $25,600 greater on a sublease given by respondent to a temporary occupier than as bare unheated warehouse space.

The District Court ruled that removal expenses should be included in the measure of just compensation, and awarded to respondent the stipulated amount. 71 F. Supp. 1001. The Court of Appeals affirmed, Chief Judge Magruder dissenting. 170 F. 2d 752. The disagreement was due not to differences of independent views but to conflicting meanings drawn from the decisions of this Court in *United States* v. *General Motors Corp.*, 323 U. S. 373, and *United States* v. *Petty Motor Co.*, 327 U. S. 372. The need for clarification led us to bring the case here. 336 U. S. 950.

The *General Motors* and *Petty Motor* cases concerned themselves with the situation in which the Government does not take the whole of a man's interest but desires merely temporary occupancy of premises under lease. *General Motors* held that when such occupancy is for a period less than an outstanding term, removal costs may be considered in the award of "just compensation" to the temporarily ejected tenant—not as an independent

item of damage, but as bearing on the rental value such premises would have on a voluntary sublease by a long-term tenant to a temporary occupier.[2]

In this holding of what is just, within the requirements of the Fifth Amendment, the Court was scrupulously careful not to depart from the settled rule against allowance for "consequential losses" in federal condemnation proceedings. 323 U. S. at 379 *et seq.* When there is an entire taking of a condemnee's property, whether that property represents the interest in a leasehold or a fee, the expenses of removal or of relocation are not to be included in valuing what is taken. That rule was found inapplicable to the new situation presented by the *General Motors* case—inapplicable, that is, where what was to be valued was "a right of temporary occupancy of a building equipped for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use." 323 U. S. at 380.

Petty Motor made clear that the taking of the whole of a tenant's lease does not fall within the *General Motors* doctrine. The reason for the distinction between the two situations was made explicit in *Petty Motor:*

> "There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. This was brought out in the *General Motors* decision. Because of that continuing obligation in all takings of temporary occupancy of leaseholds, the

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[2] This holding in the *General Motors* case was the Court's determination, without any congressional action, of what constituted "just compensation" under the Fifth Amendment.

value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal." 327 U. S. at 379–80.

While it is true that in both the *General Motors* and *Petty Motor* cases the Government had retained an option to vary the duration of its occupancy—in the former case it could extend, and in the latter it could shorten—the legal significance of such an option with respect to removal costs was not squarely in issue. It is now. Where the Government initially takes an occupancy for less than the outstanding term of a lease but then exercises its renewal option so as to exhaust the entire lease, shall this be treated merely as a temporary occupancy during part of an outstanding lease and thus within the *General Motors* doctrine, or as a taking of the whole lease and hence within *Petty Motor*?[3]

Here, as in *General Motors*, the Government initially took over only part of an outstanding lease. But here the Secretary of War in fact continued the Army's occupancy of the premises beyond the expiration of Westinghouse's lease. Judged by the event, therefore, this case was unlike *General Motors* in that what the Government took was the whole of the lease. It was thus like *Petty Motor*. The formal difference between this case and *Petty Motor* was that in this case the Government began with an occupancy shorter than the outstanding lease with a contingent reservation for its extension, while in *Petty Motor* there was a contingent reservation to shorten an occupancy that nominally exhausted the lease.

To make a distinction between taking a part of a lease with notice that the period of occupancy may be

[3] Problems relating to the valuation of renewal options are not before us on this record. It need hardly be said that provision for renewal does not necessitate the same rental for the renewed period as for the initial period. Whether a rental for each renewed period was initially fixed in this case is not disclosed by the stipulated facts.

extended for the rest of the leasehold, and formally taking a whole leasehold with the right to occupy only a portion of it and throw up the rest, is to make the constitutional requirement for just compensation turn on a wholly barren formality. It is barren because a taking of a contingent occupancy by the Government could be cast in either form by those in charge of its condemnation proceedings without the slightest difference to the Government's interest. The reason for condemnation for a period shorter than a tenant's outstanding term with notice that extensions may absorb the balance of the term (*i. e.*, the form in this case), or for condemnation formally for the whole of an unexpired leasehold with notice that the Government's occupancy may be terminated before the outstanding term has expired (*i. e.*, the form in *Petty Motor*), is precisely the same. It is a recognition of the contingencies which may determine the duration of the emergency during which the Government seeks temporary occupancy of leased premises. And so it takes a flexible term, casting the burden of the contingency upon the ousted tenant.

Under either type of condemnation the United States may in fact move out before the ousted leaseholder's term has expired, thus imposing upon him the duty to return to the premises or make some other burdensome adjustment. In that event, he is placed in precisely the same boat as was the General Motors Corporation, and the cost of removal is therefore admissible in evidence "as bearing on the market rental value of the temporary occupancy taken." 323 U. S. at 383. Contrariwise, under either type of condemnation the Government may continue its occupancy throughout the tenant's term. In that event, the situation is governed by *Petty Motor* and removal costs may not be taken into account. The final severance of a lessee's occupancy as against a temporary interruption of an outstanding leasehold, even though not de-

finitively fixed at the outset, is a difference in degree wide enough to justify a difference in result.

The test of the outcome—is the Government merely a temporary occupier of an unexpired leasehold or has it absorbed the term of the lease?—has actuality behind it. Until events have made it clear, we cannot know whether the tenant will have to move back into his leased premises or make some other adjustment, and thus we cannot know whether the reason for the *General Motors* doctrine operates.

Condemnation for indefinite periods of occupancy was a practical response to the uncertainties of the Government's needs in wartime. Law has sufficient flexibility to accommodate itself to these uncertainties by making what is a relatively minor item await the event. To do so does not keep the litigation open longer than it has to be kept open, because the total award for the Government's occupancy cannot be determined until its duration is known. The usual rule for ascertaining value at the time of taking is not disrespected if one item is made a function of the future because only then can it be known whether that item forms a part of what has been "taken." The alternative is to require a forecast of the possibility that the tenant will have to move back into the premises. The factors on which such a forecast must be based are too contingent, too unique for guidance by experience, to permit rational assessment. This is a situation where the law should express "a judgment from experience as against a judgment from speculation." *Tanner* v. *Little,* 240 U. S. 369, 386. Or, as it was put by Mr. Justice Cardozo for the Court in a relevant situation: "Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within." *Sinclair*

Refining Co. v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 698.

An award based on removal costs will of course be delayed until it is known whether the Government's occupancy has exhausted the tenant's leasehold. But this presents no real administrative difficulties. That the essential facts here became known before the time for judicial determination hardly makes this case atypical. Even in the cases where the event is still open, the cost of moving out, insofar as it is to be reflected in just compensation, may be treated as a segregated item. Thus, its amount may be ascertained at an early stage of the judicial proceedings, but the judgment made conditional upon the outcome of the Government's occupancy. And rental payments due from the Government need not be postponed. So long as the duration of the Government's occupancy is undetermined, the District Court must necessarily retain the case for the periodic determination and payment of rental compensation. This is so in the absence of any problem arising out of removal costs. No unfairness or embarrassment to the displaced tenant is thus involved by leaving liability based on removal to await the event.

In the case before us, it was known at the time of trial in the District Court that respondent's term had been exhausted by the Government's occupancy. Accordingly, the judgment is reversed insofar as it awards $25,600 to respondent.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE JACKSON, dissenting.

Difficulties in resolving the controversy over removal costs are caused by a condemnation policy under which the Government, in taking temporary use of property,

also condemns an option to renew or shorten the period of use. While we have decided cases in which questions concerning options were raised, *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Petty Motor Co.*, 327 U. S. 372, I think that the Court has not fully faced up to the implications of the optioning policy.

Valuation problems of the past have been simple contrasted to those the new policy imposes upon courts. Condemnation in the main was of title to physical properties, and the problem of just compensation was one of ascertaining the equivalent in money at the date of appropriation—a date that had already arrived. The courts were dealing with *a single point of time* and with facts and conditions which were at least in experience, not prophecy.

In recent years, the Government embarked upon a new type of condemnation.[1] It does not take title to the property and put into the pockets of the owners the current money equivalent. Instead, it keeps the owners' capital tied to their investments and pays them only an estimated value of its future use. This requires courts to predict values over a period of time.

Valuing time is the essence of much business and of most speculation. All options, futures, insurance contracts, leases, investments, deferred deliveries and commitments involve an appraisal of time. And though it takes us into the realm of pure conjecture, it may be possible, however unsatisfactorily, to fix values for rights of future occupancy if the period of the occupancy can be known.

The Government, however, has adopted the policy of expropriating for a "flexible term" by condemning a right

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[1] See Just, *Condemnation Procedure During World War II*, 12 Geo. Wash. L. Rev. 286; Dolan, *Present Day Court Practice in Condemnation Suits*, 31 Va. L. Rev. 9.

to shorten or to extend the use from time to time as may please it. This type of condemnation denies courts even a defined time period to evaluate, and it is small wonder that the Court concludes this leaves the factors too contingent and unique "to permit rational assessment." This raises the question whether Congress ever authorized a type of expropriation that can not be rationally compensated.

The statute upon which the taking in this case rests—one of the broadest of its kind ever enacted by Congress—authorizes various officers ". . . to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes . . . ." 56 Stat. 177. Its legislative history provides no explanation of the language which authorizes taking "any real property, temporary use thereof, or other interest therein," [2] nor does it offer any reason for its inclusion.[3] But Congress had no apparent expectation

[2] *E. g., cf.* S. Rep. No. 989, 77th Cong., 2d Sess. 4 (1942). (The bill covers interests in real property, including easements and other rights appurtenant thereto.) Hearings before the House Committee on the Judiciary on S. 2208, 77th Cong., 2d Sess. 15 (1942). (It would enable the acquisition of leaseholds or of any other property.)

[3] Title II of the Second War Powers Act, 56 Stat. 177, 50 U. S. C. App. § 632, the statute here involved, was amendatory to the Act of July 2, 1917 (40 Stat. 241), To Authorize Condemnation Proceedings of Lands for Military Purposes. As originally introduced, the 1917 Act contained authorization for only the condemnation of "any land, or right pertaining thereto." 55 Cong. Rec. 3632 (1917). But, upon the unexplained recommendation of the then Secretary of War, the words "temporary use thereof or other interest therein" were inserted after the word "land." See H. R. Rep. No. 83, 65th Cong., 1st Sess. (1917); 55 Cong. Rec. 3991, 4130–4131, 4263 (1917). These words were carried over by the amendatory Act without comment.

See generally, Senate Committee Print, Statements in Executive Session on S. 2208, 77th Cong., 2d Sess. 6–7, 13–16; S. Rep. No. 989,

that it would authorize condemnations for unstated periods of time.[4] The announced purpose of the legislation was to increase the number of federal officials authorized to institute condemnation proceedings, to authorize the possession and use of property prior to the completion of condemnation proceedings, and to eliminate uncertainties regarding the taking in the same proceeding of personalty located upon or used along with the real property being condemned.[5] And though authority for condemning less than a fee had existed theretofore, the whole question of taking temporary uses was in some doubt.[6]

It is plain that Congress contemplated only such takings as were necessary. We should give this a broad construction; we may even go so far as to say that the necessity for a taking is a political or policy question not usually subject to judicial review. But the statute implies some foundation in necessity and nothing can be

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77th Cong., 2d Sess. 4 (1942); Hearings before the House Committee on the Judiciary on S. 2208, 77th Cong., 2d Sess. 10, 15–23 (1942); H. R. Rep. No. 1765, 77th Cong., 2d Sess. 6 (1942); 88 Cong. Rec. 1639–1641, 1644–1645, 1647–1650, 1653–1656.

[4] See, *e. g.*, testimony of Attorney General Biddle in Hearings before the House Committee on the Judiciary on S. 2208, n. 2, *supra*, at 19:

"Mr. HANCOCK of New York. Is it possible under a condemnation act to acquire temporary use?

"Mr. BIDDLE. Yes, sir.

"Mr. HANCOCK of New York. In that case the title would revert back to the original owner after the temporary use.

"Mr. BIDDLE. Yes.

"Mr. HANCOCK of New York. But you can acquire property by a lease?

"Mr. BIDDLE. Yes. You can condemn it for a *certain length of time*." (Emphasis added.)

See also materials cited in nn. 2, 3, *supra*, and 5, 6, *infra*.

[5] *E. g.*, Committee Print, n. 3, *supra*, at 6; S. Rep. No. 989, n. 3, *supra*, at 4; Hearings, n. 3, *supra*, at 10, 15–23; H. R. Rep. No. 1765, n. 3, *supra*, at 6.

[6] See 88 Cong. Rec. 1644–45, 1647–48, 1653. See also n. 4, *supra*.

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less necessary than condemnation of an option to take property or its possession.

The United States needs no such option, for its inherent condemnation power, by its very nature, is a perpetual option to take, at any time, any property it needs. The effect of condemning an option to take at some future time is to increase the element of uncertainty and speculation in the liquidation of an award. Furthermore, such purpose is wholly one-sided. If, let us say, the price level should fall, the Government, even though it wants the property, is not bound to keep it on the option terms. That is the essence of option. But it may abandon the option and take the property under a new declaration, thereby getting a new valuation in the light of the lower price level. If, however, prices go up, the Government can use its condemned option to keep the owner from enjoying the rising value of his property as other owners may do. The taking of a term with an option to lengthen is therefore no more than a hedge against inflation.

This same one-sidedness inheres in the policy of taking a term with an option to shorten. Specific authority exists for government officials to dispose of surplus properties taken for war purposes; [7] indeed such authority is contained in the very statute under consideration.[8] Various officials are given power to "lease, sell, or otherwise dispose of" any properties taken by condemnation which become surplus or unnecessary. And so, if the Government condemned for a term with an option to shorten, and then determined that the property so taken was no longer necessary, it could sell, lease, or otherwise dispose of the remainder of the term at the then current market price. This it would certainly do if the price level had risen. But if prices had fallen, it could avoid the loss of trading

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[7] *E. g.*, 54 Stat. 712, 50 U. S. C. App. § 1171 (b).

[8] 54 Stat. 713; 56 Stat. 177. And see 88 Cong. Rec. 1648.

on the open market by exercising the option to shorten, cut down the term and put on the owner the burden of salvaging its surplus property. The taking of a term with an option to shorten is therefore no more than a hedge against deflation.

It seems unlikely that Congress intended to authorize such speculative transactions as result from an option to increase or decrease the time period. If we change the terms of the taking so that the time is known but the space is indefinite, the hazard to the Government becomes quickly apparent; if we had a declaration taking such part of a property as from time to time the Government would want, we would have to compensate on the basis that the taking was of the maximum within its terms. Such indefinite takings invite excessive awards, for the speculation involved is involuntary with the claimant and its outcome controlled by, and hedged in the interest of, the Government. *Cf. United States* v. *Certain Parcels of Land, etc.*, 55 F. Supp. 257, 265.

The Court gives up the effort to value what is taken and determines to postpone determination of compensation to await the event. This expedient recognizes, but does not fairly solve, the problem engendered by this type of condemnation. If there is a present taking, the property owner is entitled to pocket his compensation. It seems hardly fair that the owner, dispossessed for a time which he can not learn, must wait indefinitely to be paid anything except bare rental, regardless of the other expense he may be put to. How can the owner know whether to sell his removable property, store it, or perhaps to liquidate his business, or seek a new location, without knowing the length of time for which the Government is taking his premises? The property owner cannot await the happening of the event to make these essential business judgments. To let the Government take an option and pay for it only if it decides to exercise it, is to give

the Government a "Heads I win; Tails you lose" position in a gamble the property owner has not willingly joined.[9]

I think we should hold the effort to condemn options to be a nullity for want of congressional authorization and determine claims for just compensation on the basis of the fixed term specified in the declaration. If the Government, upon expiration of the fixed term, desires

[9] It is unnecessary, if Congress has not authorized such condemnations, to rely on any constitutional doubts concerning them. But we should note that a local scheme not too unlike the Government's condemnation policies has been successfully challenged on constitutional grounds in at least one jurisdiction. The General City Law of New York provides that city planning boards may file master plans providing for the development of the city, and "for the purpose of preserving the integrity of such official map" no permits, as a general matter, will issue for building in the bed of any street or highway laid out on the map; and this, despite the fact that the map may at all times be modified and the proposed construction may never be carried out. N. Y. General City Law (McKinney, Consol. Laws of N. Y., Supp. 1949) §§ 26–39. This law empowers a municipality to restrict the use of private property which it may at some future time decide to take. See *Matter of the City of New York,* 196 N. Y. 255, 259, 89 N. E. 814, 815–816. It grants, in effect, a form of restrictive option. And although it was drafted with an eye to avoiding the pitfalls which brought invalidation upon an earlier similar scheme, see *Forster* v. *Scott,* 136 N. Y. 577, 32 N. E. 976, it has already been subjected to a preliminary constitutional skirmish. See *Platt* v. *City of New York,* 196 Misc. 360, 92 N. Y. S. 2d 138, rev'd on other grounds, 276 App. Div. 873, 93 N. Y. S. 2d 738. And other courts have indicated that, where a right is so vague that a judicial determination cannot be made of just compensation for its taking, the right to expropriate fails, see *Albright* v. *Sussex County Lake & Park Comm'n,* 71 N. J. L. 303, 307–308, 57 A. 398, 400–401, and that certain personal rights are not subject to condemnation. *Hamilton, Glendale & Cincinnati Traction Co.* v. *Parish,* 67 Ohio St. 181, 192–193, 65 N. E. 1011, 1014. These cases do not govern us, but they indicate that we are on the very fringes of unconstitutionality and might well indulge in an interpretation of the statute which will keep us clearly out of it.

to continue in possession, it may file a new declaration of taking and have the value of that term fixed in the light of conditions that then prevail. If it abandons the property before the fixed term expires, it has surplus property on its hands to dispose of as it may choose. These are not, of course, very satisfactory results, but they would come nearer obeying the constitutional mandate of "just compensation" than the delayed decision course adopted by the Court.

SOUTH ET AL. *v.* PETERS, CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 724. Decided April 17, 1950.

1. The Federal District Court properly dismissed the complaint herein challenging the validity of Georgia's county unit election system under the Fourteenth and Seventeenth Amendments. Pp. 276–277.
2. Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions. P. 277.

89 F. Supp. 672, affirmed.

The District Court dismissed a suit to restrain adherence to the county unit system prescribed by Ga. Code Ann. §§ 34–3212 *et seq.*, in the forthcoming Democratic Party primary for United States Senator, Governor and other state offices. 89 F. Supp. 672. On appeal to this Court, *affirmed*, p. 277.

Hamilton Douglas, Jr. for appellants.

Eugene Cook, Attorney General of Georgia, *M. H. Blackshear*, Assistant Attorney General, *M. F. Goldstein* and *B. D. Murphy* for appellees.

PER CURIAM.

The Georgia statute which appellants attack as violative of the Fourteenth and Seventeenth Amendments provides that county unit votes shall determine the outcome of a primary election.[1] Each county is allotted a

[1] Ga. Code Ann. §§ 34–3212 *et seq.* (1936). Although this particular statute was enacted in 1917, the county unit has been basic in the state electoral scheme since Georgia's first constitution in 1777.

number of unit votes, ranging from six for the eight most populous counties, to two for most of the counties. The candidate who receives the highest popular vote in the county is awarded the appropriate number of unit votes. Appellants, residents of the most populous county in the State, contend that their votes and those of all other voters in that county have on the average but one-tenth the weight of those in the other counties. Urging that this amounts to an unconstitutional discrimination against them, appellants brought this suit to restrain adherence to the statute in the forthcoming Democratic Party primary for United States Senator, Governor and other state offices.

The court below dismissed appellants' petition. 89 F. Supp. 672. We affirm. Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions. See *MacDougall* v. *Green,* 335 U. S. 281 (1948); *Colegrove* v. *Green,* 328 U. S. 549 (1946); *Wood* v. *Broom,* 287 U. S. 1, 8 (1932); cf. *Johnson* v. *Stevenson,* 170 F. 2d 108 (C. A. 5th Cir., 1948).

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I suppose that if a State reduced the vote of Negroes, Catholics, or Jews so that each got only one-tenth of a vote, we would strike the law down. The right to vote in a primary was held in *Nixon* v. *Herndon,* 273 U. S. 536, to be covered by the Equal Protection Clause of the Fourteenth Amendment. And where, as in Georgia, a party primary election is an integral part of the state election machinery, the right to vote in it is protected by the Fifteenth Amendment. *Smith* v. *Allwright,* 321 U. S. 649. And see *United States* v. *Classic,* 313 U. S.

299. Under both Amendments discriminations based on race, creed or color fall beyond the pale.

Yet there is evidence in this case showing that Georgia's County Unit System of consolidating votes in primary elections makes an equally invidious discrimination. Under this primary law the nomination does not go to the candidate who gets the majority or plurality of votes. Votes are counted county by county. The winner in each county gets a designated number of votes—six in the most populous counties, four in the next most populous, two in each of the rest.

Plaintiffs are registered voters in Georgia's most populous county—Fulton County. They complain that their votes will be counted so as drastically to reduce their voting strength.

They show that a vote in one county will be worth over 120 times each of their votes. They show that in 45 counties a vote will be given twenty times the weight of each of theirs. They show that on a state-wide average each vote outside Fulton County will have over 11 times the weight of each vote of the plaintiffs.

Population figures show that there is a heavy Negro population in the large cities. There is testimony in the record that only in those areas have Negroes been able to vote in important numbers. Yet the County Unit System heavily disenfranchises that urban Negro population. The County Unit System has indeed been called the "last loophole" around our decisions holding that there must be no discrimination because of race in primary as well as in general elections.

The racial angle of the case only emphasizes the bite of the decision which sustains the County Unit System of voting. The discrimination against citizens in the more populous counties of Georgia is plain. Because they are city folks their voting power is only an eleventh or a hundred and twentieth of the voting power of other

citizens. I can see no way to save that classification under the Equal Protection Clause. The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government.

The County Unit System has other constitutional infirmities. Article I, § 2 of the Constitution provides that members of the House of Representatives shall be "chosen" by the people. And the Seventeenth Amendment provides that Senators shall be "elected by the people." These constitutional rights extend to the primary where that election is an integral part of the procedure of choosing Representatives or Senators, or where in fact the primary effectively controls the choice. *United States* v. *Classic, supra.* In Georgia's primary to be held on June 28, 1950, a United States Senator will be nominated. Certainly in a State like Georgia, where the Democratic nomination is equivalent to election, it would be a travesty to say that the true election in the constitutional sense comes later.

There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. *United States* v. *Classic, supra; Ex parte Yarbrough,* 110 U. S. 651. It also includes the right to have the vote counted at full value without dilution or discount. *United States* v. *Saylor,* 322 U. S. 385. That federally protected right suffers substantial dilution in this case. The favored group has full voting strength. The groups not in favor have their votes discounted.

In *Colegrove* v. *Green,* 328 U. S. 549, we had before us a case involving the division of Illinois into congressional districts in such a way that gross inequalities in voting resulted. Citizens of heavily populated districts sued to enjoin state officials from holding an election under the

Illinois law governing congressional districts. There was an argument, persuasive to three members of the Court, that the issue presented was of a political nature and not justiciable, that it was an effort to get the federal courts "to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation." 328 U. S. 552. And in *MacDougall* v. *Green,* 335 U. S. 281, the Court on a closely divided vote refused to interfere with the provisions of the Illinois law governing the formation of a new political party. There is no such force in the argument that the question in the present case is political and not justiciable.

Plaintiffs sue as individuals to enforce rights political in origin and relating to political action. But as Mr. Justice Holmes said of the same argument in *Nixon* v. *Herndon, supra,* p. 540, it is "little more than a play upon words" to call it a political suit and therefore a nonjusticiable one. The rights they seek to enforce are personal and individual. Moreover, no decree which we need enter would collide either with Congress or with the election. Georgia need not be remapped politically. The Georgia legislature need not take new action after our decree. There is no necessity that we supervise an election. There need be no change or alteration in the place of the election, its time, the ballots that are used, or the regulations that govern its conduct. The wrong done by the County Unit System takes place not only after the ballots are in the box but also after they have been counted. The impact of the decree would be on the tallying of votes and the determination of what names go on the general election ballot. The interference with the political processes of the state is no greater here than it is when ballot boxes are stuffed or other tampering with the votes occurs and we take action to correct the practice. And related considerations, which led Mr. Justice Rutledge to conclude in *Colegrove* v. *Green* that the Court

should not exercise its equity powers in that election, are lacking here. There is time to act, since the state primary is called for June 28, 1950. Relief can be certain. No conflict with any policy of Congress is possible. There is no overhauling of the State's electoral process.

The case is of greater importance than the rights of plaintiffs in this next election may appear to be. We have here a system of discrimination in primary voting that undermines the advances made by the *Nixon, Classic,* and *Allwright* cases. Those decisions are defeated by a device as deeply rooted in discrimination as the practice which keeps a man from the voting booth because of his race, creed or color, or which fails to count his vote after it has been cast.

It is said that the dilution of plaintiffs' votes in the present case is justified because equality of voting is unnecessary in the nomination of United States Senators. Thus it is pointed out that in some states nomination is by conventions. But that proves too much. If that premise is allowed, then the whole ground is cut from under our primary cases since *Nixon* v. *Herndon,* which have insisted that where there is voting there be equality. Indeed the only tenable premise under the Fourteenth, Fifteenth and Seventeenth Amendments is that where nominations are made in primary elections, there shall be no inequality in voting power by reason of race, creed, color or other invidious discrimination.

CASSELL *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 46. Argued November 10, 1949.—Decided April 24, 1950.

Petitioner, a Negro, was convicted in a Texas state court for murder, notwithstanding his motion to quash the indictment on the ground that his rights under the Fourteenth Amendment had been violated by the exclusion of Negroes from the grand jury. The jury commissioners testified that no Negroes were selected for the grand jury because they chose jurymen only from people with whom they were personally acquainted and they knew no Negroes who were eligible and available for grand-jury service. It also appeared from the record that, from 1942, when *Hill* v. *Texas*, 316 U. S. 400, was decided, until petitioner's indictment in 1947, there had been 21 grand juries on none of which was there more than one Negro, that of the 252 members 17 (or 6.7%) were Negroes, and that about 15.5% of the population of the county and 6.5% of the eligible voters were Negroes. *Held:* The conviction is reversed. Pp. 282–298.
154 Tex. Cr. R. —, 216 S. W. 2d 813, reversed.

The Texas Court of Criminal Appeals affirmed petitioner's conviction for murder. 154 Tex. Cr. R. —, 216 S. W. 2d 813. This Court granted certiorari. 336 U. S. 943. *Reversed,* p. 290.

Chris Dixie argued the cause for petitioner. With him on the brief were *L. N. D. Wells, Jr.* and *W. J. Durham.*

Joe R. Greenhill, First Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Price Daniel,* Attorney General, and *E. Jacobson,* Assistant Attorney General.

MR. JUSTICE REED announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE CLARK concurred.

Review was sought in this case to determine whether there had been a violation by Texas of petitioner's federal constitutional right to a fair and impartial grand jury.

The federal question was raised by a motion to quash the indictment on the ground that petitioner, a Negro, suffered unconstitutional discrimination through the selection of white men only for the grand jury that indicted him. After full hearing, the trial court denied the motion, and this action was sustained by the Court of Criminal Appeals of Texas in affirming petitioner's conviction. *Cassell* v. *State,* 154 Tex. Cr. R. ——, 216 S. W. 2d 813.

The Court of Criminal Appeals accepted the federal rule that a Negro is denied the equal protection of the laws when he is indicted by a grand jury from which Negroes as a race have been intentionally excluded. *Cassell* v. *State, supra,* 154 Tex. Cr. R. at ——, 216 S. W. 2d at 819; *Neal* v. *Delaware,* 103 U. S. 370, 394; *Smith* v. *Texas,* 311 U. S. 128, 130; *Hill* v. *Texas,* 316 U. S. 400, 404; *Akins* v. *Texas,* 325 U. S. 398, 403. It was from an examination of facts that the court deduced its conclusion that racial discrimination had not been practiced. Since the result reached may deny a federal right, we may reexamine the facts to determine whether petitioner has sustained by proof his allegation of discrimination.[1] Certiorari was granted (336 U. S. 943) to consider petitioner's claim that in this case Negroes were omitted from the list of grand jurymen either because of deliberate limitation by the Dallas County jury commissioners, or because of failure by the commissioners to acquaint themselves with available Negroes.

Acting under the Texas statutes,[2] the Dallas County grand-jury commissioners chose a list of sixteen males [3]

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[1] *Norris* v. *Alabama,* 294 U. S. 587, 590; *Pierre* v. *Louisiana,* 306 U. S. 354, 358; *Smith* v. *Texas,* 311 U. S. 128, 130; *Fay* v. *New York,* 332 U. S. 261, 272.

[2] Texas Code of Criminal Procedure (Vernon, 1948), Arts. 333–340.

[3] *Id.,* Art. 338. Under the Texas Constitution and statutes, women may not serve on Texas juries. Texas Constitution, Art. 5, § 13; *Harper* v. *State,* 90 Tex. Cr. R. 252, 234 S. W. 909.

for this September 1947 grand jury from citizens eligible under the statute.[4] The judge chose twelve of these for the panel.[5] No challenge is now made to the fairness of this statutory system. We have approved it.[6]

Petitioner's attack is upon the way the statutory method of grand-jury selection has been administered by the jury commissioners.[7] One charge is that discrimination must have been practiced because the Negro proportion of grand jurors is less than the Negro proportion of the county's population. Under the 1940 census the total population of Dallas County was 398,564, of whom 61,605 were Negroes.[8] This is about 15.5%. In

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[4] Texas Code of Criminal Procedure (Vernon, 1948):

"Art. 339. . . . No person shall be selected or serve as a grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

[5] *Id.*, Art. 357.

[6] *Smith* v. *Texas, supra*, p. 130. See *Zimmerman* v. *State*, 59 A. 2d 675, 676–77, affirmed under title *Zimmerman* v. *Maryland*, 336 U. S. 901; *Fay* v. *New York*, 332 U. S. 261, 266, 272; Morse, A Survey of the Grand Jury System, Part II, 10 Ore. L. Rev. 217, 226–239.

[7] There is no suggestion in the case that any judge of the county trial courts discriminated against Negroes in his selection from the lists of the members for the grand juries.

[8] Sixteenth Census of the United States: 1940, Population, Volume II, Part 6, p. 795.

weighing this matter of custom, we limit ourselves, as do the parties, to the period between June 1, 1942, when *Hill* v. *Texas, supra,* was decided, and November 1947, when petitioner was indicted. There were 21 grand juries in this period; of the 252 members of the panels,[9] 17, or 6.7%, were Negroes. But this apparent discrepancy may be explained by the fact that Texas grand jurors must possess certain statutory qualifications.[10] Grand jurors must ordinarily be eligible to vote; eligibility requires payment of a poll tax;[11] and the validity of the poll-tax requirement is not challenged. The record shows 5,500 current Negro poll-tax payers in Dallas County in 1947, and nothing indicates that this number varied substantially from year to year.[12] The corresponding figure for all poll-tax payers, male and female, is 83,667.[13] These figures would indicate that as a proportional matter 6.5% of grand jurors would be Negroes, a percentage approximating the ratio of Negroes actually sitting on the 21 grand jury panels.[14] Without

[9] We use the word "panel" to mean the grand jury which is the final result of the statutory procedure. See Texas Code of Criminal Procedure, Art. 360. The record does not indicate the number of Negroes who were placed on the lists of sixteen, but did not serve. All that appears in this connection is that no Negroes were placed on the list in this case.

[10] See note 4, *supra.*

[11] Texas Constitution, Art. 6, § 2; Vernon's Texas Statutes, 1948, Art. 2955; *Conklin* v. *State,* 144 Tex. Cr. R. 210, 162 S. W. 2d 416.

[12] There is some obscurity in the record as to whether the above figure of Negro poll-tax payers refers to males only or to men and women. 154 Tex. Cr. R. —, —, —, 216 S. W. 2d 813, 816, 819. The testimony and the statistics in the briefs cause us to conclude that the figure refers to all eligible Negro voters.

[13] Texas Almanac, 1947–1948, p. 421.

[14] In our computations we have used statistics which include both men and women, because in many cases statistical breakdowns in terms of sex are not available. Although only men may serve on the grand juries, the use of totals including both sexes should make for only minor variations in the percentages.

more it cannot be said that Negroes had been left off grand-jury panels to such a degree as to establish a *prima facie* case of discrimination.[15]

A different question is presented by petitioner's next charge that subsequent to the *Hill* case the Dallas County grand-jury commissioners for 21 consecutive lists had consistently limited Negroes selected for grand-jury service to not more than one on each grand jury. The contention is that the *Akins* case has been interpreted in Dallas County to allow a limitation of the number of Negroes on each grand jury, provided the limitation is approximately proportional to the number of Negroes eligible for grand-jury service. Since the *Hill* case the judges of the trial court have been careful to instruct their jury commissioners that discrimination on grounds of race or color is forbidden.[16] The judge did so here.[17] If, notwithstanding this caution by the trial court judges, commissioners should limit proportionally the number of Negroes selected for grand-jury service, such limitation would violate our Constitution. Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.

We have recently written why proportional representation of races on a jury is not a constitutional requisite.[18] Succinctly stated, our reason was that the Constitution requires only a fair jury selected without regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impos-

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[15] Compare *Norris* v. *Alabama*, 294 U. S. 587, 591; *Pierre* v. *Louisiana*, 306 U. S. 354, 361; *Smith* v. *Texas*, 311 U. S. 128, 129; *Hill* v. *Texas*, 316 U. S. 400, 401–403.

[16] *Akins* v. *Texas*, 325 U. S. 398, 404.

[17] *Cassell* v. *State*, 154 Tex. Cr. R. —, 216 S. W. 2d 813.

[18] *Akins* v. *Texas*, *supra*, 403.

sible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color,[19] proportional limitation is not permissible. That conclusion is compelled by the United States Code, Title 18, § 243,[20] based on § 4 of the Civil Rights Act of 1875. While the language of the section directs attention to the right to serve as a juror, its command has long been recognized also to assure rights to an accused. Prohibiting racial disqualification of Negroes for jury service, this congressional enactment under the Fourteenth Amendment, § 5,[21] has been consistently sustained and its violation held to deny a proper trial to a Negro accused.[22] Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race.

Our holding that there was discrimination in the selection of grand jurors in this case, however, is based on another ground. In explaining the fact that no Negroes appeared on this grand-jury list, the commissioners said that they knew none available who qualified; at the same time they said they chose jurymen only from those people

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[19] *Neal* v. *Delaware*, 103 U. S. 370, 394; *Akins* v. *Texas*, *supra*, 404.

[20] "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

[21] "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[22] See *Neal* v. *Delaware*, *supra*, 385, 386; *Hill* v. *Texas*, *supra*, 404; *Fay* v. *New York*, *supra*, 284.

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with whom they were personally acquainted.[23] It may be assumed that in ordinary activities in Dallas County, acquaintanceship between the races is not on a sufficiently familiar basis to give citizens eligible for appointment as jury commissioners an opportunity to know the qualifications for grand-jury service of many members of another race. An individual's qualifications for grand-jury

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[23] One commissioner said: "I was not personally acquainted with any negro citizen of Dallas County that I thought was qualified to sit on the Grand Jury, at that time. I did not know a one personally that I would recommend, myself, at that time.

" . . . The reason that I did not submit the name of a negro in my 6 names that I submitted was because I did not know any negro citizen that I felt was qualified with reference to education and business ability to serve on this Grand Jury."

Another said:

"We did not select a negro when I served as a Commissioner; we did disregard color, race or creed; I did not know plenty of negroes that I said would be qualified. I know a lot of negroes that are qualified lawyers, doctors, Superintendents of Schools and that sort of thing but the particular thing is that their occupation precludes their serving. You could not ask a doctor or lawyer to serve 3 months of their time, either white or colored; that limited us as to the number that we could select. I knew a lot of white and colored people that were qualified.

"I did not select a negro on this Grand Jury Panel but I tried." This commissioner had sought a Negro High School Principal for the list.

The third said: "The reason a negro was not selected was not because we discriminated; I only appointed those that I personally knew to be qualified.

. . . . . .

"If the name of any qualified negro citizen — been submitted at that time, who had given his permission and said that he had time to serve, I certainly would have submitted his name along with the other 15 names, if it was somebody that would have been acceptable to me."

service, however, are not hard to ascertain,[24] and with no evidence to the contrary, we must assume that a large proportion of the Negroes of Dallas County met the statutory requirements for jury service.[25] When the commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color.[26] They did not do so here, and the result has been racial discrimination. We repeat the recent statement of Chief Justice Stone in *Hill* v. *Texas,* 316 U. S. 400, 404:

> "Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified negroes available for jury service. With the large number of colored male residents of the county who are literate, and in the absence of any countervailing testimony, there is no room for inference that there are not among them householders of good moral character, who can read and write, qualified and available for grand jury service."

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[24] See Texas Code of Criminal Procedure, Arts. 339, 355.

In large centers methods of selection other than personal acquaintanceship have been found convenient. *Fay* v. *New York,* 332 U. S. 261.

[25] *Pierre* v. *Louisiana,* 306 U. S. 354, 360.

[26] *Smith* v. *Texas, supra,* 131–132. There was a further discussion of the duty of jury commissioners to familiarize themselves with jury eligibles in *Hill* v. *State,* 144 Tex. Cr. R. 415, 418, 157 S. W. 2d 369, 371. The commissioners' lack of acquaintance with available Negroes was not deemed sufficient by the state court to justify reversal. We disagreed and reversed. 316 U. S. 400.

The existence of the kind of discrimination described in the *Hill* case does not depend upon systematic exclusion continuing over a long period and practiced by a succession of jury commissioners. Since the issue must be whether there has been discrimination in the selection of the jury that has indicted petitioner, it is enough to have direct evidence based on the statements of the jury commissioners in the very case. Discrimination may be proved in other ways than by evidence of long-continued unexplained absence of Negroes from many panels. The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes in an area where Negroes made up so large a proportion of the population, prove the intentional exclusion that is discrimination in violation of petitioner's constitutional rights.

The judgment of the Court of Criminal Appeals of Texas is

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON and MR. JUSTICE MINTON join, concurring in the judgment.

It has been settled law since 1880 that the Civil War Amendments barred the States from discriminating because of race in the selection of juries, whether grand or petty. As a result, a conviction cannot stand which is based on an indictment found by a grand jury from which Negroes were kept because of discrimination. *Neal* v. *Delaware,* 103 U. S. 370; *Pierre* v. *Louisiana,* 306 U. S. 354. We ought not to reverse a course of decisions of long standing directed against racial discrimination in the administration of justice. But discrimination in this

context means purposeful, systematic non-inclusion because of color. *Hill* v. *Texas,* 316 U. S. 400. It does not mean an absence of proportional representation of the various racial components of the relevant political unit from which a grand jury is drawn or an isolated instance of disparity among such components. *Akins* v. *Texas,* 325 U. S. 398, 403; *Fay* v. *New York,* 332 U. S. 261, 284. Assuming that the grand-jury pool fairly enough reflects the racial composition of the community, there is no basis for a claim of constitutional discrimination if without design it comes to pass that a particular grand jury has no representation of a particular race. The Civil War Amendments did not deprive the States of their power to define qualifications for grand-jury service relevant to the functions of a grand jury, nor did they turn matters that are inherently incommensurable into mere matters of arithmetic. The Constitution has not withdrawn the administration of criminal justice, of which the jury system is a part, from the States. It does command that no State purposefully make jury service turn on color.

A claim that the constitutional prohibition of discrimination was disregarded calls for ascertainment of two kinds of issues which ought not to be confused by being compendiously called "facts." The demonstrable, outward events by which a grand jury came into being raise issues quite different from the fair inferences to be drawn from what took place in determining the constitutional question: was there a purposeful non-inclusion of Negroes because of race or a merely symbolic representation, not the operation of an honest exercise of relevant judgment or the uncontrolled caprices of chance?

This Court does not sit as a jury to weigh conflicting evidence on underlying details, as for instance what steps were taken to make up the jury list, why one person was rejected and another taken, whether names were

picked blindly or chosen by judgment. This is not the place for disputation about what really happened. On that we accept the findings of the State court. But it is for this Court to define the constitutional standards by which those findings are to be judged. Thereby the duty of securing observance of these standards may fall upon this Court. The meaning of uncontrovertible facts in relation to the ultimate issue of discrimination is precisely the constitutional issue on which this Court must pass. See *Watts* v. *Indiana,* 338 U. S. 49, 50–51. Of course even as to this, as always when a State court judgment is claimed to be in disregard of the Constitution, appropriate respect should be given to the judgment of the State court. And so we are brought to this case.

If the record here showed no more than that the grand-jury commissioners had considered the Negroes with whom they were acquainted—just as they considered white persons whom they knew—and had found them to be either unqualified for grand-jury service or qualified but unavailable, and did so not designedly to exclude Negroes, the State court's validation of the local procedure would have to prevail. We ought not to go behind such a conscientious process, however rough and ready the procedure of selection by jury commissioners. To find in such honest even if pragmatic selection of grand jurors the operation of unconstitutional standards would turn this Court into an agency for supervising the criminal procedure of the forty-eight States. Such an assumption of authority by this Court would jeopardize the practical functioning of grand juries throughout the country in view of the great variety of minority groups that compose our society.

A different situation would be presented by an unquestioned showing that jury commissioners had such a limited personal knowledge of potentially qualified Negro jurors that their purposeful limitation of choice to the

negligibly few Negroes known to them would inevitably imply designed exclusion of eligible Negroes. The record here affords no basis whatever for such a finding. It indicates the contrary.

The record does disclose stark facts requiring reversal on a very different basis. If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose. The purpose may not be of evil intent or in conscious disregard of what is conceived to be a binding duty. Prohibited conduct may result from misconception of what duty requires. Such misconception I believe to be the real situation on the record before us.

The governing facts are briefly stated. In *Hill* v. *Texas, supra,* this Court found discrimination in the selection of grand jurors in Dallas County, Texas, by virtue of the fact that, despite a large number of Negroes qualified for grand-jury service, none had been drawn. In the course of the five and a half years between that decision and the time of the drawing of the grand jury which found the indictment now challenged, there were twenty-one grand-jury panels.[1] On each of these twenty-one consecutive panels there was never more than one Negro. This selection was made from lists which were not the result of a drawing of lots but the personal choice of the grand-jury commissioners. The available evidence clearly indicates that no more than one Negro was chosen by the commissioners for each of the twenty-one lists. Only one Negro was placed on the list—he did not serve on the

[1] I use the term "panel," as does MR. JUSTICE REED in his opinion, to mean the grand jury of twelve selected from the list of sixteen persons tendered to the judge by the grand-jury commissioners.

panel—for the second grand jury in Dallas County after the decision in *Hill* v. *Texas*. Again, as to the grand jury which figured in *Akins* v. *Texas, supra,* only one Negro was placed on the list, and he served as a grand juror. 325 U. S. at 405. And in *Weems* v. *State,* 148 Tex. Crim. 154, 157, 185 S. W. 2d 431, 433, it was stipulated that only one Negro, who did not serve on the panel, was on the list. In the present case it is conceded that no Negro was placed on the list. The State makes no contrary claim as to any of the other grand-jury lists though the facts regarding them are peculiarly within the State's knowledge. In view of this background, the assumption that more than one Negro was placed on the lists is inconceivable.

To assume that the commissioners did tender to the judges lists containing more than one Negro would lead inescapably to the conclusion that the judges systematically discriminated against Negroes. This is so because it just does not happen that from lists of sixteen it is always Negroes (barring one) that judges unpurposefully reject. I cannot attribute such discrimination to the trial judges of Dallas County. I can decline to attribute such discrimination to these judges only by concluding that the judges were never given the opportunity to select more than one Negro.

The grand-jury commissioners here received instructions from the judge not to "discriminate," and I have no doubt that they tried conscientiously to abide by them. The difficulty lies in what they conceived to be the standard for determining discrimination, as revealed by their action. The number of Negroes both qualified and available for jury service in Dallas County precluded such uniform presence of never more than one Negro on any other basis of good faith than that the commissioners were guided by the belief that one Negro on the grand jury satisfied the prohibition against discrimination in

Hill v. *Texas*. That this was their view is compelled by their testimony at the hearing on the motion to quash the indictment.[2]

This is of course a misconception. The prohibition of the Constitution against discrimination because of color does not require in and of itself the presence of a Negro on a jury. But neither is it satisfied by Negro representation arbitrarily limited to one. It is not a question of presence on a grand jury nor absence from it. The basis of selection cannot consciously take color into account. Such is the command of the Constitution. Once that restriction upon the State's freedom in devising and administering its jury system is observed, the States are masters in their own household. If it is observed, they cannot be charged with discrimination because of color, no matter what the composition of a grand jury may turn out to be.

On this record I cannot escape the conclusion that the judgment below is not based on an allowable finding of

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[2] The following is a fair compilation of the testimony of the three grand-jury commissioners on this point:

". . . it was discussed in the Jury Room [among] we Commissioners that an effort had been made to secure a negro for the Grand Jury . . . ."

"The reason that a negro was not put on this Grand Jury Panel was not because I had not made an effort to secure one . . . ."

"I did not select a negro on this Grand Jury Panel but I tried."

"As far as I know, there was not a negro on the October, 1947, Term of Grand Jury; I have never seen them in a body. When the information came to me I tried to contact a negro . . . ."

"The reason a negro was not selected was not because we discriminated . . . ."

"If the name of any qualified negro citizen [had] been submitted at that time, who had given his permission and said that he had time to serve, I certainly would have submitted his name along with the other 15 names, if it was somebody that would have been acceptable to me."

facts behind which this Court cannot go. It derives from the ultimate constitutional significance of undisputed facts. These bear no other rational meaning than purposeful discrimination. It does not neutralize the discrimination that it may well have been due to a misconception by the grand-jury commissioners of the requirements of this Court's decisions.

This compels reversal of the judgment.

MR. JUSTICE CLARK, concurring.

For the reasons stated by MR. JUSTICE JACKSON, it seems to me quite doubtful as an original issue whether a conviction should be reversed because of purposeful exclusion of the members of a race from the grand jury which returned the indictment. However, I think we must adhere to the settled course of decision by this Court with respect to such exclusion.

I am unable to conclude that from the date of the decision in *Hill* v. *Texas,* 316 U. S. 400 (1942) to the date of the trial of this case there has been purposeful systematic limitation of the number of Negroes on grand juries in Dallas County. The only evidence relied upon to establish such limitation is with regard to the composition of the twenty-one grand juries, including the jury returning the indictment of petitioner, which were impaneled during this period. But each of these grand juries of twelve persons was selected by a judge from a list of sixteen persons prepared by commissioners. The record shows only those Negroes who have actually served on the grand juries and not those who were on the commissioners' lists. We cannot conclude that there has been uniformity as to race in the selections of commissioners when we do not know how many Negroes have been on their lists. Even if judicial notice is taken of the racial composition of three lists during the period in question, which are reported in *Akins* v. *Texas,* 325

U. S. 398, 405 (1945) and in *Weems* v. *State,* 148 Tex. Cr. R. 154, 157, 185 S. W. 2d 431, 433 (1945), there remain sixty-eight persons on the lists whose race is not ascertainable from the record or from any concession of counsel. Nor do I think that alternatively we are compelled by the statistics relied upon by petitioner to conclude that the judges purposefully discriminated during this period. Any presumption as to the purpose of the judges, or of the commissioners whom the judges appointed, instructed and supervised, must be that they intended no racial limitation. And the testimony of the judge who impaneled the grand jury in this case and a number of other grand juries during the period under review, as well as the testimony of the commissioners in this case as to the judge's instructions to them, indicates that he has not purposefully limited participation on account of race. In the face of this presumption and testimony, I think that, even if there were more than one Negro on each of the commissioners' lists, we could not infer any purpose on the part of the judges to limit Negro participation solely because of race. The burden of showing facts which permit an inference of purposeful limitation is on the defendant. *Martin* v. *Texas,* 200 U. S. 316 (1906). I do not find the present record persuasive that there was such limitation.

The difficulties facing grand-jury commissioners are well illustrated by this case. On the one hand they are told that purposeful discrimination is inferred from the available statistics during the previous five and one-half years, showing that no more than one Negro was chosen for each of 21 grand juries; that this indicates that the commissioners must have been guided by the misconceived view that the presence of one Negro on the grand jury satisfied constitutional requirements. But they are also told quite properly that a token representation of a race on a grand jury is not a constitutional requisite; that

in fact it may reach the point of illegality; that representation on the grand jury by race in proportion to population is not permissible for there must be "neither inclusion nor exclusion because of race." Under these circumstances one may, like Job's comforter, only add to the commissioners' distress by writing further. But it does appear to me from this record that their responsibility is broader than they understood it to be. They frankly stated that in making up the list they discussed only those persons whom they knew personally, and that they considered only one Negro, a school principal who could not serve. The record indicates clearly that there were Negroes qualified and available whom the commissioners did not know but whom upon inquiry they should have considered. Their responsibility was to learn whether there were persons among the Negroes they did not know who were qualified and available for service. *Hill* v. *Texas,* 316 U. S. 400 (1942); *Smith* v. *Texas,* 311 U. S. 128 (1940). The elimination of this large group in the community from the commissioners' consideration deprived petitioner of constitutional safeguards as defined in the decisions of this Court. For this reason I concur in the opinion of MR. JUSTICE REED and in the judgment of reversal.

MR. JUSTICE JACKSON, dissenting.

The case before us is that of a Negro convicted of murder by crushing the skull of a sleeping watchman with a piece of iron pipe to carry out a burglary. No question is here as to his guilt. We are asked to order his release from this conviction upon the sole ground that Negroes were purposefully discriminated against in selection of the grand jury that indicted him. It is admitted that Negroes were not excluded from the trial jury by which he was convicted.

In setting aside this conviction, the Court is moved by a desire to enforce equality in that realm where, above all, it must be enforced—in our judicial system. But this conviction is reversed for errors that have nothing to do with the defendant's guilt or innocence, or with a fair trial of that issue. This conflicts with another principle important to our law, *viz.*, that no conviction should be set aside for errors not affecting substantial rights of the accused.

This Court has never weighed these competing considerations in cases of this kind. The use of objections to the composition of juries is lately so much resorted to for purposes of delay, however, and the spectacle of a defendant putting the grand jury on trial before he can be tried for a crime is so discrediting to the administration of justice, that it is time to examine the basis for the practice.

I.

It is the command of the Fourteenth Amendment that Negro citizens be afforded the same opportunities to serve upon grand juries as are afforded white citizens. Moreover, Congress, which is authorized to provide for its enforcement, has enacted that "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; . . . ." Act of March 1, 1875, c. 114, § 4, 18 Stat. 336, 62 Stat. 696, 18 U. S. C. § 243.

The substantive right is thus clear. But whose right is it? The right is conferred upon the qualified colored citizen to serve on equal terms with the qualified white citizen. This defendant is not here asking that right for himself. He claims that failure to give other Negroes an equal right to sit on the grand jury gives him quite

a different right—a right not to be indicted by it. Two reasons occur to me which could justify this Court in translating the wrong to those Negroes excluded from a grand jury into a right of this defendant to void an indictment. One is that the absence of Negroes on the grand jury prejudiced this defendant. The other is that it is the only practicable method for enforcing the right of qualified Negroes to serve on grand juries. It is doubtful if either of these can be sustained.

II.

Congress, which has implemented the right of Negroes to serve on juries, had also commanded all United States Courts to give judgment "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."[1] And this same congressional policy was manifested in a provision directing that no indictment found and presented by a grand jury in United States Courts "shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant";[2] and also in the provision that a

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[1] The quoted language appeared in 40 Stat. 1181, 28 U. S. C. (1940 ed.) § 391. This provision was repealed in the revision of the Judicial Code in 1948, Act of June 25, 1948, c. 646, § 39, 62 Stat. 992, 998, apparently because it had been embodied in Rule 52 (a), Federal Rules of Criminal Procedure, see Note of the Advisory Committee following Rule 52 (a); but was partially reenacted by Act of May 24, 1949, c. 139, § 110, 63 Stat. 105, and now appears as § 2111, 28 U. S. C. (Supp. III, 1950).

[2] 17 Stat. 198, 18 U. S. C. (1940 ed.) § 556, repealed in the 1948 revision of the Criminal Code, Act of June 25, 1948, c. 645, § 21, 62 Stat. 862, 866, apparently for the reason that it had been incorporated in Rules 6 and 52, Federal Rules of Criminal Procedure. See Notes of Advisory Committee following Rules 6 and 52.

motion to quash an indictment shall fail where the ground is that one or more members of the grand jury were unqualified, but where it appears that twelve or more qualified jurors concurred in the finding of the indictment.[3]

This Court never has explained how discrimination in the selection of a grand jury, illegal though it be, has prejudiced a defendant whom a trial jury, chosen with no discrimination, has convicted. The reason this question was not considered perhaps is that, in the earlier cases where convictions were set aside, the discrimination condemned was present in selecting *both grand and trial jury* and, while the argument was chiefly based on the latter, the language of the opinions made no differentiation, nor for their purpose did they need to. *Cf. Strauder* v. *West Virginia,* 100 U. S. 303; *Neal* v. *Delaware,* 103 U. S. 370; see also *Bush* v. *Kentucky,* 107 U. S. 110; *Gibson* v. *Mississippi,* 162 U. S. 565; *Hale* v. *Kentucky,* 303 U. S. 613. Only within the last few years have convictions been set aside for discrimination in composition of the grand jury alone, and in these the question now under consideration was not discussed. *Pierre* v. *Louisiana,* 306 U. S. 354; *Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400.

It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least may, prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand. The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose

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[3] 48 Stat. 649, 18 U. S. C. (1940 ed.) § 554a, repealed by Act of June 25, 1948, c. 645, § 21, 62 Stat. 862, 866, apparently because of its incorporation into Rule 6 (b) (2), Federal Rules of Criminal Procedure. See Note of Advisory Committee following Rule 6 (b) (2).

influence we cannot weigh. A single juror's dissent is generally enough to prevent conviction. A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot have the appearance, of impartiality, especially when the accused is a Negro and the alleged victim is not.

The grand jury is a very different institution. The States are not required to use it at all. *Hurtado* v. *California,* 110 U. S. 516. Its power is only to accuse, not to convict. Its indictment does not even create a presumption of guilt; all that it charges must later be proved before the trial jury, and then beyond a reasonable doubt. The grand jury need not be unanimous. It does not hear both sides but only the prosecution's evidence, and does not face the problem of a choice between two adversaries. Its duty is to indict if the prosecution's evidence, unexplained, uncontradicted and unsupplemented, would warrant a conviction. If so, its indictment merely puts the accused to trial. The difference between the function of the trial jury and the function of the grand jury is all the difference between deciding a case and merely deciding that a case should be tried.

It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice. In this case a trial judge heard the prosecution's evidence, ruled it sufficient to warrant a conviction, appellate courts have held the same, and no further question about it is before us. Moreover, a jury admittedly chosen without racial discrimination has heard the prosecution's and defendant's evidence and has held that guilt beyond a reasonable doubt has been proved. That finding, too, has been affirmed on appeal and is not here. Under such circumstances, it is frivolous to contend that any grand jury, however constituted, could have done its duty in any way other than to indict.

III.

Congress has provided means other than release of convicted defendants to enforce this right of the Negro community to participate in grand jury service; and they are, if used, direct and effective remedies to accomplish this purpose.

"[W]hoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen" because of his color or race has committed a federal crime and is subject to a fine of not more than $5,000. 62 Stat. 696, 18 U. S. C. § 243.

Congress has also provided that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an *action at law, suit in equity,* or *other proper proceeding for redress.*" 17 Stat. 13, 8 U. S. C. § 43. (Emphasis supplied.)

These criminal and civil remedies for discriminatory exclusions from the jury have been almost totally neglected both by the Federal Government and by Negro citizens entitled to sit as jurors. Back in 1878 a state judge was indicted in federal court for violation of the Act and this Court sustained it. *Ex parte Virginia,* 100 U. S. 339. That case has been allowed to stand as solitary and neglected authority for direct enforcement of the Negro's right to sit on juries.

Qualified Negroes excluded by discrimination have available, in addition, remedies in courts of equity. I suppose there is no doubt, and if there is this Court can dispel it, that a citizen or a class of citizens unlawfully

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excluded from jury service could maintain in a federal court an individual or a class action for an injunction or mandamus against the state officers responsible. *Cf. Hague* v. *Committee for Industrial Organization,* 307 U. S. 496; *Douglas* v. *Jeannette,* 319 U. S. 157; *Morris* v. *Williams,* 149 F. 2d 703; *Myerson* v. *Samuel,* 74 F. Supp. 315; *Roles* v. *School Board,* 61 F. Supp. 395. If the order were evaded or disobeyed, imprisonment for contempt could follow.

IV.

It is implicit in the Court's decision that the federal penal statute, 18 U. S. C. § 243, *supra,* has been violated. So in effect it holds that the crime of discrimination offsets the crime of murder and that the State must start over again, if death of witnesses, loss of evidence or other conditions wrought by time do not prevent.

I do not see how this Court can escape the conclusion that any discrimination in selection of the grand jury in this case, however great the wrong toward qualified Negroes of the community, was harmless to this defendant. To conclude otherwise is to assume that Negroes qualified to sit on a grand jury would refuse even to put to trial a man whom a lawfully chosen trial jury found guilty beyond a reasonable doubt.

The Negro's right to be selected for grand jury service is unquestionable and should be directly and uncompromisingly enforced. But I doubt if any good purpose will be served in the long run by identifying the right of the most worthy Negroes to serve on grand juries with the efforts of the least worthy to defer or escape punishment for crime. I cannot believe that those qualified for grand jury service would fail to return a true bill against a murderer because he is a Negro. But unless they would, this defendant has not been harmed.

I would treat this as a case where the irregularity is not shown to have harmed this defendant, and affirm the conviction. But in this and similar cases, I would send a copy of the record to the Department of Justice for investigation as to whether there have been violations of the statute and, if so, for prosecution.

MULLANE, SPECIAL GUARDIAN, *v.* CENTRAL HANOVER BANK & TRUST CO., TRUSTEE, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 378. Argued February 8, 1950.—Decided April 24, 1950.

A trust company in New York which had exclusive management and control of a common trust fund established by it under § 100–c of the New York Banking Law petitioned under that section for a judicial settlement of accounts which would be binding and conclusive as to any matter set forth therein upon everyone having any interest in the common fund or in any participating trust. In this common fund the trust company had invested assets of numerous small trusts of which it was trustee and of which some of the beneficiaries were residents and some nonresidents of the State. The only notice of this petition given beneficiaries was by publication in a local newspaper pursuant to § 100–c (12). *Held:*

1. Whether such a proceeding for settlement of accounts be technically *in personam, in rem,* or *quasi in rem,* the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is such as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard. Pp. 311–313.

2. The statutory notice by publication is sufficient as to any beneficiaries whose interests or addresses are unknown to the trustee, since there are no other means of giving them notice which are both practicable and more effective. Pp. 313–318.

3. Such notice by publication is not sufficient under the Fourteenth Amendment as a basis for adjudication depriving of substantial property rights known persons whose whereabouts are also known, since it is not impracticable to make serious efforts to notify them at least by ordinary mail to their addresses on record with the trust company. Pp. 318–320.

299 N. Y. 697, 87 N. E. 2d 73, reversed.

Overruling objections to the statutory notice to beneficiaries by publication authorized by § 100–c of the New York Banking Law, a New York Surrogate's Court entered a final decree accepting an accounting of the trustee of

a common trust fund established pursuant to that section. 75 N. Y. S. 2d 397. This decree was affirmed by the Appellate Division of the Supreme Court of New York (see 274 App. Div. 772, 80 N. Y. S. 2d 127) and the Court of Appeals of New York (299 N. Y. 697, 87 N. E. 2d 73). On appeal to this Court, *reversed,* p. 320.

Kenneth J. Mullane argued the cause and filed a brief for appellant.

Albert B. Maginnes argued the cause for the Central Hanover Bank & Trust Co., appellee. With him on the brief was *J. Quincy Hunsicker, 3rd.*

James N. Vaughan submitted on brief for Vaughan, appellee.

Peter Keber and *C. Alexander Capron* filed a brief for the New York State Bankers Association, as *amicus curiae,* urging affirmance.

Mr. Justice Jackson delivered the opinion of the Court.

This controversy questions the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law. The New York Court of Appeals considered and overruled objections that the statutory notice contravenes requirements of the Fourteenth Amendment and that by allowance of the account beneficiaries were deprived of property without due process of law. 299 N. Y. 697, 87 N. E. 2d 73. The case is here on appeal under 28 U. S. C. § 1257.

Common trust fund legislation is addressed to a problem appropriate for state action. Mounting overheads have made administration of small trusts undesirable to corporate trustees. In order that donors and testators of moderately sized trusts may not be denied the service of corporate fiduciaries, the District of Columbia and some

thirty states other than New York have permitted pooling small trust estates into one fund for investment administration.* The income, capital gains, losses and expenses of the collective trust are shared by the constituent trusts in proportion to their contribution. By this plan, diversification of risk and economy of management can be extended to those whose capital standing alone would not obtain such advantage.

Statutory authorization for the establishment of such common trust funds is provided in the New York Banking Law, § 100–c (c. 687, L. 1937, as amended by c. 602, L. 1943 and c. 158, L. 1944). Under this Act a trust company may, with approval of the State Banking Board, establish a common fund and, within prescribed limits,

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*Ala. Code Ann., 1940, Cum. Supp. 1947, tit. 58, §§ 88 to 103, as amended, Laws 1949, Act 262; Ariz. Code Ann., 1939, Cum. Supp. 1949, §§ 51–1101 to 51–1104; Ark. Stat. Ann. 1947, §§ 58–110 to 58–112; Cal. Bank. Code Ann., Deering, 1949, § 1564; Colo. Stat. Ann., 1935, Cum. Supp. 1947, c. 18, §§ 173 to 178; Conn. Gen. Stat. 1949 Rev., § 5805; Del. Rev. Code, 1935, § 4401, as amended, Laws, 1943, c. 171, Laws 1947, c. 268; (D. C.) 63 Stat. 938; Fla. Stat., 1941, §§ 655.29 to 655.34; Ga. Code Ann., 1937, Cum. Supp. 1947, §§ 109–601 to 109–622; Idaho Code Ann., 1949, Cum. Supp. 1949, §§ 68–701 to 68–703; Ill. Rev. Stat., 1949, c. 16½, §§ 57 to 63; Ind. Stat. Ann., Burns, 1950, §§ 18–2009 to 18–2014; Ky. Rev. Stat., 1948, § 287.230; La. Gen. Stat. Ann., 1939, § 9850.64; Md. Ann. Code Gen. Laws, 1939, Cum. Supp. 1947, art. 11, § 62A; Mass. Ann. Laws, 1933, Cum. Supp. 1949, c. 203A; Mich. Stat. Ann., 1943, §§ 23.1141 to 23.1153; Minn. Stat., 1945, § 48.84, as amended, Laws 1947, c. 234; N. J. Stat. Ann., 1939, Cum. Supp. 1949, §§ 17:9A–36 to 17:9A–46; N. C. Gen. Stat., 1943, §§ 36–47 to 36–52; Ohio Gen. Code Ann. (Page, 1946) §§ 715 to 720, 722; Okla. Stat., 1941, Cum. Supp. 1949, tit. 60, § 162; Pa. Stat. Ann., 1939, Cum. Supp. 1949, tit. 7, §§ 819–1109 to 819–1109d; So. Dak. Laws 1941, c. 20; Tex. Rev. Civ. Stat. Ann., 1939, Cum. Supp. 1949, art. 7425b–48; Vt. Stat., 1947 Rev., § 8873; Va. Code Ann., 1950, §§ 6–569 to 6–576; Wash. Rev. Stat. Ann., Supp. 1943, §§ 3388 to 3388–6; W. Va. Code Ann., 1949, § 4219(1) *et seq.*; Wis. Stat., 1947, § 223.055.

invest therein the assets of an unlimited number of estates, trusts or other funds of which it is trustee. Each participating trust shares ratably in the common fund, but exclusive management and control is in the trust company as trustee, and neither a fiduciary nor any beneficiary of a participating trust is deemed to have ownership in any particular asset or investment of this common fund. The trust company must keep fund assets separate from its own, and in its fiduciary capacity may not deal with itself or any affiliate. Provisions are made for accountings twelve to fifteen months after the establishment of a fund and triennially thereafter. The decree in each such judicial settlement of accounts is made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any participating estate, trust or fund.

In January, 1946, Central Hanover Bank and Trust Company established a common trust fund in accordance with these provisions, and in March, 1947, it petitioned the Surrogate's Court for settlement of its first account as common trustee. During the accounting period a total of 113 trusts, approximately half *inter vivos* and half testamentary, participated in the common trust fund, the gross capital of which was nearly three million dollars. The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some of them were not residents of the State of New York.

The only notice given beneficiaries of this specific application was by publication in a local newspaper in strict compliance with the minimum requirements of N. Y. Banking Law § 100–c (12): "After filing such petition [for judicial settlement of its account] the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week

for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund." Thus the only notice required, and the only one given, was by newspaper publication setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds.

At the time the first investment in the common fund was made on behalf of each participating estate, however, the trust company, pursuant to the requirements of § 100–c (9), had notified by mail each person of full age and sound mind whose name and address were then known to it and who was "entitled to share in the income therefrom . . . [or] . . . who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice." Included in the notice was a copy of those provisions of the Act relating to the sending of the notice itself and to the judicial settlement of common trust fund accounts.

Upon the filing of the petition for the settlement of accounts, appellant was, by order of the court pursuant to § 100–c (12), appointed special guardian and attorney for all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund; and appellee Vaughan was appointed to represent those similarly interested in the principal. There were no other appearances on behalf of any one interested in either interest or principal.

Appellant appeared specially, objecting that notice and the statutory provisions for notice to beneficiaries were inadequate to afford due process under the Fourteenth Amendment, and therefore that the court was without jurisdiction to render a final and binding decree. Appellant's objections were entertained and overruled, the Surrogate holding that the notice required and given was sufficient. 75 N. Y. S. 2d 397. A final decree accepting the accounts has been entered, affirmed by the Appellate Division of the Supreme Court, 275 App. Div. 769, 88 N. Y. S. 2d 907, and by the Court of Appeals of the State of New York. 299 N. Y. 697, 87 N. E. 2d 73.

The effect of this decree, as held below, is to settle "all questions respecting the management of the common fund." We understand that every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree. See *Matter of Hoaglund,* 194 Misc. 803, 811–812, 74 N. Y. S. 2d 156, 164, aff'd 272 App. Div. 1040, 74 N. Y. S. 2d 911, aff'd 297 N. Y. 920, 79 N. E. 2d 746; *Matter of Bank of New York,* 189 Misc. 459, 470, 67 N. Y. S. 2d 444, 453; *Matter of Security Trust Co. of Rochester, id.* 748, 760, 70 N. Y. S. 2d 260, 271; *Matter of Continental Bank & Trust Co., id.* 795, 797, 67 N. Y. S. 2d 806, 807–808.

We are met at the outset with a challenge to the power of the State—the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York. It is contended that the proceeding is one *in personam* in that the decree affects neither title to nor possession of any *res,* but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust. Accordingly, it is said, under the strict doctrine of *Pennoyer* v. *Neff,* 95 U. S. 714, the Surrogate

is without jurisdiction as to nonresidents upon whom personal service of process was not made.

Distinctions between actions *in rem* and those *in personam* are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own. Buckland and McNair, *Roman Law and Common Law,* 66; Burdick, *Principles of Roman Law and Their Relation to Modern Law,* 298. The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification. American courts have sometimes classed certain actions as *in rem* because personal service of process was not required, and at other times have held personal service of process not required because the action was *in rem.* See cases collected in *Freeman on Judgments,* §§ 1517 *et seq.* (5th ed.).

Judicial proceedings to settle fiduciary accounts have been sometimes termed *in rem,* or more indefinitely *quasi in rem,* or more vaguely still, "in the nature of a proceeding *in rem.*" It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both *in rem* and *in personam.* But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding

upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which

would place impossible or impractical obstacles in the way could not be justified.

Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean,* 234 U. S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer,* 311 U. S. 457; *Grannis* v. *Ordean,* 234 U. S. 385; *Priest* v. *Las Vegas,* 232 U. S. 604; *Roller* v. *Holly,* 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance, *Roller* v. *Holly, supra,* and *cf. Goodrich* v. *Ferris,* 214 U. S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions

are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." *American Land Co.* v. *Zeiss,* 219 U. S. 47, 67; and see *Blinn* v. *Nelson,* 222 U. S. 1, 7.

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *Hess* v. *Pawloski,* 274 U. S. 352, with *Wuchter* v. *Pizzutti,* 276 U. S. 13, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.

Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, *cf. Anderson National Bank* v. *Luckett,* 321 U. S. 233; *Security Savings Bank* v. *California,* 263 U. S. 282, or that he has left some caretaker under a duty to let him know that it is being jeopardized. *Ballard* v. *Hunter,* 204 U. S. 241; *Huling* v. *Kaw Valley R. Co.,* 130 U. S. 559. As phrased long ago by Chief Justice Marshall in *The Mary,* 9 Cranch 126, 144, "It is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it."

In the case before us there is, of course, no abandonment. On the other hand these beneficiaries do have a resident fiduciary as caretaker of their interest in this property. But it is their caretaker who in the accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so. Not even the special guardian is required or apparently expected to communicate with his ward and client, and, of course, if such a duty were merely trans-

ferred from the trustee to the guardian, economy would not be served and more likely the cost would be increased.

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. *Cunnius* v. *Reading School District,* 198 U. S. 458; *Blinn* v. *Nelson,* 222 U. S. 1; and see *Jacob* v. *Roberts,* 223 U. S. 261.

Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee. Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary. We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the

name of due process. The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remaindermen, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages. These are practical matters in which we should be reluctant to disturb the judgment of the state authorities.

Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses. *Cf. Wuchter* v. *Pizzutti, supra.* Certainly sending them a copy of the statute months and perhaps years in advance does not answer this purpose. The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests.

We need not weigh contentions that a requirement of personal service of citation on even the large number of known resident or nonresident beneficiaries would, by

reasons of delay if not of expense, seriously interfere with the proper administration of the fund. Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack. However, no such service is required under the circumstances. This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done." *Blinn* v. *Nelson, supra,* 7.

The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with

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less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald* v. *Mabee,* 243 U. S. 90, 91.

We hold that the notice of judicial settlement of accounts required by the New York Banking Law § 100–c (12) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BURTON, dissenting.

These common trusts are available only when the instruments creating the participating trusts permit participation in the common fund. Whether or not further notice to beneficiaries should supplement the notice and representation here provided is properly within the discretion of the State. The Federal Constitution does not require it here.

SHIPMAN ET AL., TRADING AS SHIPMAN BROTHERS, ET AL. *v.* DuPRE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 689. Decided April 24, 1950.

In this case, a three-judge federal district court erred in ruling on the merits of a suit to restrain enforcement of a state statute on the ground of its invalidity under the Federal Constitution when it did not appear that the statute had been construed by the state courts; but the federal court should retain jurisdiction pending a reasonable time to afford an opportunity for complainants to obtain such a construction. Pp. 321–322.

88 F. Supp. 482, judgment vacated.

Appellants' application for a declaratory judgment and injunction, on the ground of the alleged invalidity under the Federal Constitution of certain sections of South Carolina statutes regulating the fisheries and shrimping industry, was dismissed on the merits by a three-judge federal district court. 88 F. Supp. 482. On appeal to this Court, *the judgment is vacated and the cause is remanded,* p. 322.

Aaron Kravitch, Phyllis Kravitch and *Joseph Fromberg* for appellants.

John M. Daniel, Attorney General of South Carolina, *T. C. Callison* and *R. Hoke Robinson,* Assistant Attorneys General, for appellees.

PER CURIAM.

Appellants sought a declaratory judgment that certain sections of the South Carolina statute regulating the fisheries and shrimping industry were unconstitutional, and interlocutory and permanent injunctions restraining the state officials from carrying out those provisions. The

statutory three-judge District Court assumed jurisdiction, decided the issues on the merits, and dismissed the complaint. 88 F. Supp. 482. From the papers submitted on appeal, it does not appear that the statutory sections in question have as yet been construed by the state courts. We are therefore of opinion that the District Court erred in disposing of the complaint on the merits. See *American Federation of Labor* v. *Watson,* 327 U. S. 582, 595–599.

The judgment of the District Court is vacated and the cause is remanded to that court with directions to retain jurisdiction of the complaint for a reasonable time, to afford appellants an opportunity to obtain, by appropriate proceedings, a construction by the state court of the statutory provisions involved.

Mr. Justice Douglas dissents.

UNITED STATES *v.* BRYAN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 99. Argued December 15, 1949.—Decided May 8, 1950.

Respondent was the executive secretary and had custody of the records of an association which was under investigation by the Committee on Un-American Activities of the House of Representatives. The Committee issued and served upon respondent a subpoena directing her to produce before the Committee, at a stated time, specified records of the association. Respondent appeared before the Committee, but refused to produce the records on the ground that the Committee was without constitutional right to demand them. Respondent was indicted, tried and convicted for willful default in violation of R. S. § 102, 2 U. S. C. § 192. *Held:*

1. The presence of a quorum of the Committee at the time of the return to the subpoena was not an essential element of the offense (*Christoffel* v. *United States*, 338 U. S. 84, distinguished); and, when the Government introduced evidence that respondent had been validly served with a lawful subpoena directing her to produce records within her custody and control and that on the return day she intentionally failed to comply, it made out a *prima facie* case of willful default. Pp. 327–330.

2. The defense of lack of a quorum was not available to respondent under the circumstances of this case. Pp. 330–335.

(a) When a witness seeks to excuse a default on grounds of inability to comply with a subpoena, the defense must fail in the absence of a showing of even a modicum of good faith in responding to the subpoena. P. 332.

(b) Respondent having made no objection to the lack of a quorum on her appearance before the Committee, having relied on other grounds for noncompliance with the subpoena, and having raised the quorum question for the first time on her trial two years later, she cannot rely upon the defense of lack of a quorum on her trial for willful default. Pp. 332–335.

3. The trial court did not err in permitting the Government to read to the jury the testimony that respondent had given before the Committee when called upon to produce the records. Pp. 335–343.

(a) R. S. § 859, now 18 U. S. C. § 3486, which provides that "No testimony given by a witness before . . . any committee of either House . . . shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony," did not bar the use, at respondent's trial for willful default under R. S. § 102, of the testimony given by her before the Committee. Pp. 337–340.

(b) In R. S. § 859 the term "any criminal proceeding" does not apply to a prosecution for willful default under R. S. § 102. Pp. 338, 342–343.

(c) Congress intended the immunity provided by R. S. § 859 to apply only to *past* criminal acts concerning which a witness may be called to testify. Pp. 339–343.

84 U. S. App. D. C. 394, 174 F. 2d 525, reversed.

Respondent was convicted of a violation of R. S. § 102, for failure to produce records in compliance with a subpoena of the Committee on Un-American Activities of the House of Representatives. 72 F. Supp. 58. The Court of Appeals reversed. 84 U. S. App. D. C. 394, 174 F. 2d 525. This Court granted certiorari. 338 U. S. 846. *Reversed,* p. 343.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Campbell, Robert S. Erdahl, Philip R. Monahan* and *Felicia H. Dubrovsky.*

O. John Rogge and *Benedict Wolf* argued the cause and filed a brief for respondent.

Mr. Chief Justice Vinson delivered the opinion of the Court.

Respondent is the executive secretary of an organization known as the Joint Anti-Fascist Refugee Committee (hereinafter referred to as the association) and as such has custody of its records. Prior to April 4, 1946, the Committee on Un-American Activities of the House of

Representatives, which was conducting an investigation into the activities of the association, had attempted without success to procure these records from respondent and from the chairman of the association's executive board, Dr. Edward K. Barsky. On March 29, 1946, the Committee issued subpoenas to each of the known members of the executive board summoning them to appear in the Committee's room on April 4, 1946, at 10 a. m., to testify and produce certain specified records of the association, and an identical subpoena directed to the association by name was served upon respondent Bryan in her official capacity.

Bryan and the members of the executive board appeared before the Committee at the date and time set out in the subpoenas and in response thereto. Each person so summoned failed to produce any of the records specified in the subpoenas. The members of the executive board made identical statements in which each declared that he or she did not have possession, custody or control of the records; that Miss Bryan, the executive secretary, did. Respondent admitted that the records were in her possession but refused to comply with the subpoena because "after consulting with counsel [she] came to the conclusion that the subpena was not valid" because the Committee had no constitutional right to demand the books and records. Asked whether the executive board supported her action, she refused to answer because she did not think the question pertinent.

The Committee on Un-American Activities then submitted its report and resolution to the House. Setting out at length the Committee's attempts to procure the records of the association, the report concludes:

> "The willful and deliberate refusal of Helen R. Bryan and the members of the executive board of the Joint Anti-Fascist Refugee Committee as named herein to

> produce the books, papers, and records called for in the subpenas deprives your committee of evidence necessary in the conduct of its investigation of the Joint Anti-Fascist Refugee Committee, which evidence is pertinent to the said investigation and places the said persons in contempt of the House of Representatives of the United States." [1]

The resolution directing the Speaker to certify the Committee's report to the United States Attorney for the District of Columbia for legal action was approved by the full House after debate.[2]

Respondent was indicted for violation of R. S. § 102,[3] in that she had failed to produce the records called for in the subpoenas and had thereby wilfully made default. At the trial she contended, *inter alia,* that she was not guilty of wilful default because a quorum of the Committee on Un-American Activities had not been present when she appeared on the return day. However, the trial court withdrew that issue from the jury's consideration by instructing the jury "as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appear-

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[1] 92 Cong. Rec. 3762, 79th Cong., 2d Sess. (1946).

[2] *Id.* at 3773.

[3] 11 Stat. 155, as amended, R. S. § 102, 2 U. S. C. § 192:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

ance." Respondent was found guilty, 72 F. Supp. 58, but the Court of Appeals for the District of Columbia Circuit, one judge dissenting, reversed the judgment on the ground that the presence of a quorum of the Committee at the hearing on April 4, 1946, was a material question of fact in the alleged offense and should have been submitted to the jury. 84 U. S. App. D. C. 394, 174 F. 2d 525. We granted a writ of certiorari, 338 U. S. 846, to consider this important question affecting the procedures of congressional committees.

First. R. S. § 102 was enacted in 1857. Its purpose, as stated by its sponsors, was to avoid the procedural difficulties which had been experienced by the House of Representatives when persons cited for contempt of the House were brought before its bar to show cause why they should not be committed, and, more important, to permit the imprisonment of a contemnor beyond the expiration of the current session of Congress.[4] Transmission of the fact of the commission of a contempt to the prosecuting authority is made under the Seal of the House or Senate by the Speaker or President of the Senate.[5] The judicial proceedings are intended as an alternative method of vindicating the authority of Congress to compel the disclosure of facts which are needed in the fulfillment of the legislative function. *In re Chapman,* 166 U. S. 661, 671–672 (1897); *Jurney* v. *MacCracken,* 294 U. S. 125, 151 (1935).

"Default" is, of course, a failure to comply with the summons. In this case we may assume, without deciding, that the subpoena served on respondent required her to produce the records of the association before the Committee on Un-American Activities, sitting as a commit-

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[4] See, *e. g.,* remarks of Representative Orr, Cong. Globe, 34th Cong., 3d Sess. 405 (1857).

[5] R. S. § 104, 2 U. S. C. § 194.

tee.[6] Upon that assumption, respondent takes the position that, absent a quorum, the Committee was without power to receive the records on the return day; that she cannot be guilty of a default in failing to produce papers before an "agency organizationally defective," which, for that reason, "cannot be obstructed." Respondent does not and cannot, in view of the jury's verdict, contest the finding that she deliberately and intentionally refused to produce the papers called for in the subpoena. Her contention is that a quorum of the Committee was required to meet to witness her refusal. Reliance is placed upon certain precedents of the House of Representatives, which hold that a committee report may be challenged in the House on the ground that a quorum of the committee was not present when the report was approved, and upon this

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[6] The subpoena read as follows:

"BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

"To the Sergeant at Arms, or his Special Messenger:

"You are hereby commanded to summon the Joint Anti-Fascist Refugee Committee, 192 Lexington Avenue, New York City, a voluntary organization to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Hon. John S. Wood is chairman, and to bring with you all books, ledgers, records and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or sub-committee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries. The said books, papers and records demanded herein are for the period from January 1, 1945 up to and including the date of this subpoena, in their chamber in the city of Washington, on April 4, 1946, at the hour of 10:00 A. M. then and there to testify touching matters of inquiry committed to said Committee; and [she] is not to depart without leave of said Committee.

"Herein fail not, and make return of this summons. . . ."

Court's recent decision in *Christoffel* v. *United States,* 338 U. S. 84 (1949).

The *Christoffel* case is inapposite. For that decision, which involved a prosecution for perjury before a congressional committee, rests in part upon the proposition that the applicable perjury statute requires that a "competent tribunal" be present when the false statement is made. There is no such requirement in R. S. § 102. It does not contemplate some affirmative act which is made punishable only if performed before a competent tribunal, but an intentional failure to testify or produce papers, however the contumacy is manifested. Respondent attempts to equate R. S. § 102 with the perjury statute considered in the *Christoffel* case by contending that it applies only to the refusal to testify or produce papers before a committee—*i. e.,* in the presence of a quorum of the committee. But the statute is not so limited. In the first place, it refers to the wilful failure by any person "to give testimony or to produce papers *upon any matter under inquiry* before . . . any committee of either House of Congress," not to the failure to testify before a congressional committee. And the fact that appearance before a committee is not an essential element of the offense is further emphasized by additional language in the statute, which, after defining wilful default in the terms set out above, continues, "or who, *having appeared,* refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, ..." (Emphasis supplied.)

It is clear that R. S. § 102 is designed to punish the obstruction of inquiries in which the Houses of Congress or their committees are engaged. If it is shown that such an inquiry is, in fact, obstructed by the intentional withholding of documents, it is unimportant whether the subpoenaed person proclaims his refusal to respond before

the full committee, sends a telegram to the chairman, or simply stays away from the hearing on the return day. His statements or actions are merely evidence from which a jury might infer an intent to default. A proclaimed refusal to respond, as in this case, makes that intent plain. But it would hardly be less plain if the witness embarked on a voyage to Europe on the day before his scheduled appearance before the committee.

Of course a witness may always change his mind. A default does not mature until the return date of the subpoena, whatever the previous manifestations of intent to default. But when the Government introduced evidence in this case that respondent had been validly served with a lawful subpoena directing her to produce records within her custody and control, and that on the day set out in the subpoena she intentionally failed to comply, it made out a *prima facie* case of wilful default.

Second. It is argued, however, that even if the Government is not required to prove presence of a quorum affirmatively, lack of a quorum is a defense raising material questions of fact which should have been submitted to the jury. The theory is that if the subpoena required production of the records before the Committee on Un-American Activities *qua* committee, respondent could not have complied with the subpoena in the absence of a quorum had she wished to do so, and therefore her default is not wilful, albeit deliberate and intentional. While she did not introduce any direct evidence at the trial, respondent appropriately raised the defense by cross-examination and by her motions, requests and objections.

Ordinarily, one charged with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to comply. A court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible

for their unavailability, cf. *Jurney* v. *MacCracken, supra,* or is impeding justice by not explaining what happened to them, *United States* v. *Goldstein,* 105 F. 2d 150 (1939).

On the other hand, persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned. See, *e. g., Blair* v. *United States,* 250 U. S. 273, 281 (1919); *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932).

Certain exemptions from attending or, having attended, giving testimony are recognized by all courts. But every such exemption is grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth. Dean Wigmore stated the proposition thus: "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." [7]

[7] Wigmore, Evidence (3d ed.) § 2192.

Every exemption from testifying or producing records thus presupposes a very real interest to be protected. If a privilege based upon that interest is asserted, its validity must be assessed. Since we assume in this case that the subpoenas refer to the production of papers before the Committee *qua* committee, we agree that respondent could rightfully have demanded attendance of a quorum of the Committee and declined to testify or to produce documents so long as a quorum was not present. But the courts need not treat as important that which the witness obviously regarded as unimportant.[8] Testimonial compulsion is an intensely practical matter. If, therefore, a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena. That such was the situation in this case does not admit of doubt.

In the first place, if respondent had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that she state her reasons for noncompliance upon the return of the writ. At the time and place specified in

[8] It is, of course, clear that respondent's "inability" to comply with the subpoena because a quorum of the Committee was not present amounts to no more than the claim that she is excused from doing so. The jury found that she had power to produce the papers. The question therefore arises as to what possible prejudice respondent might have suffered if she had turned over the records to less than a quorum of the Committee. In the case of oral testimony, a witness might well desire to appear only if a quorum was present because of a feeling that some committee members, unrestrained by presence of a majority, might exceed proper bounds of inquiry. But that consideration is obviously inapplicable to the production of papers and is irrelevant here in any event since respondent testified.

the subpoenas the Chairman of the Committee and a number of other members—whether or not a quorum was present at any time is not clear from the record—presented themselves for the taking of testimony and receipt of papers. The defect in composition of the Committee, if any, was one which could easily have been remedied. But the Committee was not informed until the trial, two years after the refusal to produce the records, that respondent sought to excuse her noncompliance on the ground that a quorum of the Committee had not been present. For two years, now grown to four, the Committee's investigation was obstructed by an objection which, so far as we are informed, could have been rectified in a few minutes.

Such a patent evasion of the duty of one summoned to produce papers before a congressional committee cannot be condoned. Suppose one who has been summoned to produce papers fails to deliver them as required but refuses to give any reason. May he defend a prosecution for wilful default, many months later, on the ground that he had not been given a sufficient time to gather the papers? We think such a contention hardly tenable. Yet, at the return date, compliance with the subpoena was "impossible" just as in the present case. To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes. See *Bevan* v. *Krieger*, 289 U. S. 459, 464–465 (1933).

In the second place, the fact that the alleged defect upon which respondent now insists is, in her own estimation, an immaterial one, is clearly shown by her reliance before the Committee upon other grounds for failing to produce the records. She does not deny, and the transcript of the hearing makes it perfectly clear, that she would not have complied with the subpoenas no

matter how the Committee had been constituted at the time. This Court considered a similar question in *Hale* v. *Henkel,* 201 U. S. 43 (1906), where a witness had refused in the trial court to produce certain books and papers called for by a subpoena *duces tecum* on three grounds, one of which was that it was impossible to collect the records within the time allowed. The Court pointed out that "Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time." 201 U. S. at p. 70. But having refused compliance for other reasons which the lower court could not remedy, the witness could not later complain of its refusal to do a meaningless act—to grant him additional time to gather papers which he had indicated he would not produce in any event.[9] Here respondent would have the Committee go through the empty formality of summoning a quorum of its members to gather in solemn conclave to hear her refuse to honor its demands. Presumably the same formalism would be required if respondent had informed the Committee that she was not coming at all and did not do so.

In a not dissimilar case, Judge Learned Hand stated what we consider to be the basic question before us and gave the answer which we think must necessarily follow. He said:

> "The question is no less than whether courts must put up with shifts and subterfuges in the place of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer

[9] See also, *Blackmer* v. *United States,* 284 U. S. 421, 443 (1932); *Leber* v. *United States,* 170 F. 881, 888 (1909); *London Guarantee & Accident Co., Ltd.* v. *Doyle & Doak,* 134 F. 125 (1905); *State ex rel. Berge* v. *Superior Court,* 154 Wash. 144, 281 P. 335 (1929).

sign of a feeble and fumbling law than timidity in penetrating the form to the substance." *Loubriel* v. *United States,* 9 F. 2d 807, 808 (1926).

We hold that the Government is not required to prove that a quorum of the Committee was present when the default occurred, and that under the circumstances disclosed by this record a defense of lack of a quorum was not open to respondent.

Third. Respondent also contended at the trial that the court erred in permitting the Government to read to the jury the testimony she had given before the House Committee when called upon to produce the records. She relies upon R. S. § 859, now codified in § 3486 of Title 18 U. S. C., which provides that "No testimony given by a witness before . . . any committee of either House, . . . shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. . . ." Admittedly her testimony relative to production of the books comes within the literal language of the statute; but the trial court thought that to apply the statute to respondent's testimony would subvert the congressional purpose in its passage.[10] We agree.

We need not set out the history of the statute in detail. It should be noted, however, that its function was to provide an immunity in subsequent criminal proceedings to witnesses before congressional committees, in return for which it was thought that witnesses could be compelled to give self-incriminating testimony.[11] That purpose was

[10] See the court's opinion in *United States* v. *Barsky,* 72 F. Supp. 165 (1947), affirmed, *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 138, 167 F. 2d 241, 252 (1948).

[11] R. S. § 859, as originally enacted in 1857, was a part of § 2 of a comprehensive statute, 11 Stat. 155, designed on the one hand to compel the testimony of witnesses and on the other hand to pro-

effectively nullified in 1892 by this Court's decision in *Counselman* v. *Hitchcock,* 142 U. S. 547, holding that R. S. § 860,[12] a statute identical in all material respects with R. S. § 859, was not a sufficient substitute for the constitutional privilege of refusing to answer self-incriminating questions. Under that decision, a witness who is offered only the partial protection of a statute such as §§ 859 and 860—that his testimony may not be used against him in subsequent criminal proceedings—rather than complete immunity from prosecution for any act concerning which he testifies [13] may claim his privilege and remain silent with impunity.

Section 860 was ultimately repealed. Its usefulness undermined by the *Counselman* decision, it remained on the statute books until 1910, "a shield to the criminal and an obstruction to justice." [14] But the attention of Con-

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tect them from prosecution for crimes revealed by their testimony. Section 1 of the Act became R. S. § 102, 2 U. S. C. § 192. As first enacted, § 2 not only prevented the use of a witness' testimony in subsequent criminal proceedings but gave him complete immunity from prosecution "for any fact or act touching which he shall be required to testify." This latter provision was deleted in 1862, 12 Stat. 333, leaving only the partial protection of § 859, which was in effect declared insufficient to require a witness to give self-incriminatory testimony in *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892).

[12] R. S. § 860 applied to evidence obtained from a party or witness in any "judicial proceeding" and provided that such evidence should not be used against such person in any criminal proceeding.

[13] See *Brown* v. *Walker,* 161 U. S. 591 (1896).

[14] H. R. Rep. No. 266, 61st Cong., 2d Sess., which was concurred in by the Senate Committee reporting the repealer, states:

"This section [860] was enacted apparently for the purpose of enabling the Government to compel the disclosure of incriminating testimony on condition that the witness disclosing the same would be given immunity. In the case of Counselman *v.* Hitchcock (142 U. S., 547) it was held that legislation can not abridge a constitutional privilege, and that it can not replace or supply one, at least unless

gress has not, apparently, been called to the anomaly presented by the continued existence of R. S. § 859, which, like § 860, was a constituent part of an immunity "bargain" declared invalid in the *Counselman* case.[15] The courts must, therefore, give effect to the statute. *Cameron* v. *United States,* 231 U. S. 710, 720 (1914).

Since respondent did not refuse to answer the questions put to her by members of the House Committee, her argument is not of denial of any constitutional right but solely that R. S. § 859 bars use of her testimony in her trial for wilful default.[16] The history of that statute, its original

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it is so broad as to have the same extent in scope and effect, and that said section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition, and that in view of the constitutional provision (article 5 of the amendments) a statutory enactment to be valid must afford absolute immunity against future prosecution for the offense to which the question relates.

"Since the decision above referred to section 860 has possessed no usefulness whatever, but has remained in the law as an impediment to the course of justice. Under it a witness can not be compelled to give any incriminating testimony whatever, but if he chooses to go on the witness stand and testify as to any matter whatever, even of his own volition, and, whether incriminatory or not, his testimony can not thereafter be brought up against him in any criminal proceedings. He can not be confronted with his own testimony or his own previous statement under oath even on cross-examination. The statute has become a shield to the criminal and an obstruction to justice."

[15] In 1938 Congress made minor amendments to the statutes in question without recognizing their inconsistency with the *Counselman* case. 52 Stat. 943. See S. Rep. No. 2108, 75th Cong., 3d Sess.

[16] *United States* v. *Monia,* 317 U. S. 424 (1943), is, of course, inapplicable. That decision relates to the necessity of making a claim of immunity under the particular statute there involved. The opinion specifically states that the constitutional privilege, as distinguished from the statutory immunity under consideration in that case, must be claimed. *Id.* at 427.

purpose, and its present status are all relevant considerations in its interpretation. Despite the fact that the literal language would encompass testimony elicited by the House Committee in its questioning of respondent relative to the production of the records of the association, the Court will not reach that result if it is contrary to the congressional intent and leads to absurd conclusions. *United States* v. *Kirby,* 7 Wall. 482, 486 (1869); *Glickstein* v. *United States,* 222 U. S. 139 (1911). And we are clearly of the opinion that the congressional purpose would be frustrated if the words, "in any criminal proceeding," were read to include a prosecution for wilful default under R. S. § 102.

That purpose was "more effectually to enforce the Attendance of Witnesses . . . and to compel them to discover Testimony." [17] It had been the experience of Congress prior to 1857 that witnesses could not be compelled to disclose desired information, in part because of insufficient penalties for nondisclosure, and in part because of the constitutional privilege against self-incrimination. In an attempt to surmount the latter obstacle, Congress enacted what became R. S. § 859. By granting an immunity, it was the congressional intent to compel testimony which had hitherto been unavailable.

It is now contended that the protection of the statute, which was extended to witnesses in an effort to *obtain* testimony, protects equally the person who wilfully *withholds* testimony and is prosecuted for his wilful default. This contention completely ignores the purpose of the immunity. In the first place, it imputes to Congress the contradictory and irrational purpose of granting an immunity from prosecution for contempt in order to obtain evidence of that contempt. And in the second place,

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[17] See 11 Stat. 155.

it assumes that Congress had some purpose to compel testimony of the kind here involved—statements of refusal by the witness to answer questions or produce documents—in return for which it was willing to grant an immunity. Such an assumption cannot be made. These statements have always been available to the Houses of Congress in contempt proceedings. They are uniformly printed in the reports of committees recommending contempt action [18] and are relied upon by the Houses when deliberating in contempt cases.[19] In short, the purpose of the statute contradicts its application to testimony of this kind.

Furthermore, to hold such testimony inadmissible in a prosecution for wilful default is to conclude that Con-

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[18] See, *e. g.*, S. Rep. No. 254, 73d Cong., 2d Sess., the Report of a Special Committee on Investigation of Air Mail and Ocean Mail Contracts, setting out in great detail the testimony of William P. MacCracken, Jr., et al., "in order that the Senate may determine whether or not any action shall be taken by the Senate with a view to proceeding against the said William P. MacCracken, Jr. . . . in the nature of a proceeding for contempt or otherwise . . . ." See *Jurney* v. *MacCracken*, 294 U. S. 125 (1935).

[19] The incident giving rise to enactment of the statute illustrates the point. A correspondent of the *New York Times*, having made charges of corruption on the part of members of the House of Representatives in connection with pending legislation, was called before a select committee of the House and asked to name the Representatives involved. He declined to do so for the reason that the information had been given to him in confidence. The committee's questions and the witness' answers are set out at length in the Congressional Globe, 34th Cong., 3d Sess., pp. 403–404, as a part of the committee's report and resulted in his being called to the bar of the House "to answer as for a contempt of the authority of this House," and in his subsequent commitment. These proceedings were carried on in conjunction with consideration of the statute in the House. The contention now made would impute to Congress an intent to deprive the courts of the very information upon which the House had acted in the case giving rise to the statute.

gress, for no discernable reason, made proof of contempt vastly more difficult before the courts than in its own chambers, since, as we have indicated, the Houses of Congress themselves are accustomed to rely upon such testimony. There is not a hint of any such purpose in the legislative history of the statute or the decisions construing it. On the contrary, this Court has often noted that prosecution under R. S. § 102 was intended "merely to supplement the power of contempt by providing for additional punishment." *Jurney* v. *MacCracken, supra,* at 151.

The debates attending enactment of the statutes here in question and the decisions of this and other federal courts construing substantially identical statutes make plain the fact that Congress intended the immunity therein provided to apply only to *past* criminal acts concerning which the witness should be called to testify.[20]

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[20] Representative Orr: "The bill provides that no persons called before that committee to testify before them shall be subjected to criminal prosecution for any offense *they may have committed,* and for which their testimony would furnish the basis of an indictment." Cong. Globe, 34th Cong., 3d Sess. 406. Representative Washburn: "The second section of the bill declares that no person summoned as a witness shall be excused from answering a question for the reason that his answer would criminate himself; and provides that he shall be exempt from punishment for any offense *which he may testify that he has committed,* and that on trial for such offense in any court in the country such evidence shall not be used against him." *Id.* at 428. Senator Seward: "The second section of the bill provides that such person shall have the benefit of being exempt from prosecution *as to the matter concerning which he is called to testify.*" *Id.* at 444. (Emphasis supplied throughout.) It may be pointed out that since the statute, as originally enacted, had the effect of granting total immunity from prosecution for any fact or act touching which the witness testified, adoption of respondent's contention would mean that Congress originally intended to immunize the witness who states before the committee that he will not answer questions or produce papers from any prosecution for his default.

The offense of contempt of Congress, with which we are presently concerned, on the other hand, matures only when the witness is called to appear before the committee to answer questions or produce documents and wilfully fails to do so. Until that moment he has committed no crime. There is, in our jurisprudence, no doctrine of "anticipatory contempt." While the witness' testimony may show that he has elected to perjure himself or commit contempt, he does not thereby admit his guilt of some past crime about which he has been summoned for questioning but commits the criminal act then and there.

In *Glickstein* v. *United States, supra,* this Court considered the problem thereby presented. It was there held that perjury committed in the course of testimony given pursuant to statute falls outside the purview of § 7 (9) of the Bankruptcy Act, 11 U. S. C. § 25 (10), which, like R. S. § 859, provides that no testimony given by the witness (at a creditors' meeting) shall be used against him in any criminal proceedings. In the Court's view, such an immunity "relates to the past and does not endow the person who testifies with a license to commit perjury." 222 U. S. at 142. The distinction is fully spelled out in a Circuit Court of Appeals opinion, *Edelstein* v. *United States,* 149 F. 636 (1906), which was cited with approval in the *Glickstein* case:

> "To hold that the statute protects a bankrupt from the use of his evidence in a prosecution for perjury while actually testifying would defeat the obvious purposes of the act. It would, in effect, say to the bankrupt: You may forego the exercise of your constitutional privilege, and consent to testify concerning the conduct of your business, and in that way promote the efficient administration of your estate and benefit your creditors, and by so doing secure

> the immunity provided for; but if you give false testimony, calculated to embarrass the administration of your estate and to defeat the just rights of your creditors, and thereby commit a crime specially denounced against you, you shall enjoy the same immunity therefor. Moreover, it would, in effect, secure to the bankrupt the immunity in question for violating his part of the compact, namely, to testify—that is, to testify truthfully—by virtue of which he secured a right to the immunity. We are not willing to impute to Congress any such contradictory and absurd purpose. The words 'any criminal proceeding' cannot sensibly or reasonably be construed so literally and generally as to include the criminal proceeding provided by law for false swearing in giving his testimony. They obviously have reference to such criminal proceedings as arise out of past transactions, about which the bankrupt is called to testify." 149 F. at 643–644.

That statement is at least equally applicable to statements made by the witness in refusing to answer questions or produce papers. Such, in fact, was the rationale and decision of the Third Circuit Court of Appeals in just such a case. See *In re Kaplan Bros.,* 213 F. 753 (1914). And see *Cameron* v. *United States, supra,* 719; *McCarthy* v. *Arndstein,* 266 U. S. 34, 42 (1924).

The same reasons that led this Court to conclude that the clause excepting a prosecution for perjury from the reach of another immunity statute "was added only from superfluous caution and throws no light on the construction," *Heike* v. *United States,* 227 U. S. 131, 141 (1913), lead us to hold that Congress did not intend the term, "any criminal proceeding," to encompass a prosecution of the witness for wilful default under R. S. § 102. A contrary view would simply encourage the refusal of

witnesses to answer questions or produce papers, quite contrary to the purpose of the statute.

Respondent advances several contentions which were not passed upon by the Court of Appeals. We do not decide them at this time. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE FRANKFURTER agrees with this opinion except as to the portion marked *Third,* involving the applicability of § 3486 of Title 18 U. S. C. to the facts of this case, which requires him to dissent from the judgment of reversal.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE JACKSON, concurring.

With the result I am in agreement, but I do not see how this decision and that in the *Christoffel* case, 338 U. S. 84, can coexist.

The Court is agreed that this defendant could rightly demand attendance of a quorum of the Committee and decline to testify or to produce documents so long as a quorum was not present. Therefore the real question here is whether, without making any demand, the issue may be raised for the first time long afterwards in a trial for contempt.

This case is the duplicate of *Christoffel* in this respect: in both cases defendants have sought to raise the question of no quorum for the first time in court, when they are on trial for an offense, without having raised it in any manner before the Committee while there was time to remedy it. The Court is now saying, quite properly I think, that this question must be raised at

the time when it can be corrected, and proper records made, and cannot be kept as an ace up the sleeve to be produced years later at a trial. But in *Christoffel,* the majority took the opposite view and said, "In a criminal case affecting the rights of one not a member, the occasion of trial is an appropriate one for petitioner to raise the question." *Supra,* at 88. If this statement of the law is to be left standing, I do not see how we can say that what was timely for Christoffel is too late for Bryan. It is plain we are not following the *Christoffel* decision and so I think we should candidly overrule it.

The practice of withholding all objection until time of trial is not helpful in protecting a witness' right to a valid Committee. It prevents correction of any error in that respect and profits only the witness who seeks a concealed defect to exploit. Congressional custom, whether written or not, has established that Committee members may indulge in temporary absences, unless there is objection, without disabling those remaining from continuing work as a Committee. Members may step out to interview constituents, consult members of their staffs, confer with each other, dictate a letter, or visit a washroom, without putting an end to the Committee—but always subject to call whenever the point of no quorum is raised; that is notice that someone deems their personal presence important. This is the custom *Christoffel,* in effect, denied to members of Congress. A member now steps out of a committee room at risk of nullifying the whole proceeding.

It is ironic that this interference with legislative procedures was promulgated by exercise within the Court of the very right of absentee participation denied to Congressmen. Examination of our journal on the day *Christoffel* was handed down shows only eight Justices present and that four Justices dissented in that

case. The prevailing opinion does not expressly indicate the Justices who joined in it, but only four nondissenting Justices were present to do so. On the record this would show only an equally divided Court, which would affirm the judgment below. The only way the four who were present and for a reversal could have prevailed was by counting for it one shown by the record to be absent. There is not even any public record to show that *in absentia* he joined the decision, or approved the final opinion, or considered the matter after the dissent was circulated; nor is there any written rule or law which permitted him to do so.

I want to make it clear that I am not criticizing any Justice or suggesting the slightest irregularity in what was done. I have no doubt that authorization to include the absent Justice was given; and I know that to vote and be counted *in absentia* has been sanctioned by practice and was without objection by anyone. It is the fact that it is strictly regular and customary, according to our unwritten practice, to count as present for purposes of Court action one physically absent that makes the denial of a comparable practice in Congress so anomalous. Of course, there is this difference: The absent Congressman was only necessary to a quorum; the absent Justice was necessary to a decision. No Committee action was dependent upon the Representatives presumed to be absent in the *Christoffel* case. All they could have done if present was to listen. In our own case, personal judgment and affirmative action of the absent member was necessary to make the *Christoffel* opinion a decision of the Court.

The ruling of the Court today seems irreconcilable with the Court's decision in that case. True, the ink on *Christoffel* is hardly dry. But the principle of *stare decisis,* which I think should be the normal principle of

judicial action, is not well served by failing to make explicit an overruling which is implicit in a later decision. Unless we really accede to its authority, it were far better to undo *Christoffel* before it becomes embedded in the law as a misleading influence with the profession. Of course, it is embarrassing to confess a blunder; it may prove more embarrassing to adhere to it. In view of the holding today, I think that the decision in the *Christoffel* case should be forthrightly and artlessly overruled.

MR. JUSTICE BLACK, with whom MR. JUSTICE FRANKFURTER concurs, dissenting.

18 U. S. C. § 3486 provides that no testimony given by a witness before any committee of either house "shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony." The Court admits that use of such testimony in convicting Bryan for wilful failure to produce records violated the "literal language" of § 3486, but declines to give effect to that language. I dissent from the Court's refusal to abide by this congressional mandate.

The statutory exception of "prosecution for perjury" shows that the attention of Congress was focused on whether committee testimony should be admissible in any special type of criminal prosecution. Yet the Court now reads the statute as if Congress had forbidden the use of committee testimony "except in a prosecution for perjury *or for failure to produce records.*" Such extensive judicial law-making is particularly questionable when used to restrict safeguards accorded defendants in criminal cases. Moreover, this statute springs from Congress's recognition of the constitutional privilege against compulsory self-incrimination. The Court's narrowing of the statute marks a radical departure from the principle underlying previous interpretations of other immunity legislation.

Smith v. *United States,* 337 U. S. 137; *United States* v. *Monia,* 317 U. S. 424.

The reasons given by the Court for its amendment of the statute have an anomalous basis: the Court feels compelled to alter the clear language of § 3486 in order not to "subvert the congressional purpose" which it admits has already been irrevocably frustrated by the decision in *Counselman* v. *Hitchcock,* 142 U. S. 547.

Moreover, the statutory language is so clear and precise that dubious legislative history cannot contradict it. And no part of that history even tends to show that Congress meant to permit use of a witness' testimony to convict him of any crime other than perjury. There is a justifiable reason for the perjury exception. The crime consists of the testimony itself, without which no prosecution would be possible. Not so with default in producing papers. That crime is based not on a witness's testimony but rather on his failure to produce—conduct which can be proved by members of a committee, clerks, or spectators. There is therefore no basis for saying that application of the statute as Congress wrote it would lead to "absurd conclusions" by encouraging the "refusal of witnesses to answer questions or produce papers."

As for other essential elements of the crime, such as power to produce, they cannot be proved by evidence extracted from a defendant under compulsion. A witness summoned to testify and produce papers is no less entitled to invoke the protection of this statute and of the Fifth Amendment's privilege against self-incrimination than is any other defendant. One who has failed to produce certainly could not be compelled to answer questions concerning his power to produce, thereby making him a "witness against himself." If application of the statute as Congress wrote it would lead to "absurd conclusions," so would the Fifth Amendment.

The Court finds comfort in the statement that the Committee testimony of witnesses is "uniformly printed in the reports of committees recommending contempt action" to the houses of Congress. However extensive this practice may be, it would not justify the use of such evidence in a criminal trial. By its own terms 18 U. S. C. § 3486 is expressly limited to "any criminal proceeding . . . in any court."[1]

For these reasons the judgment should be reversed and the cause remanded for a new trial.

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[1] This distinction between criminal trials and contempt proceedings at the bar of Congress is eminently reasonable in view of the practical differences between the two. See dissenting opinion in *United States* v. *Fleischman*, *post*, p. 349. For a discussion of congressional contempt procedures, see Eberling, Congressional Investigations 179 and *passim* (Columbia University Press, 1928).

UNITED STATES v. FLEISCHMAN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 98. Argued December 15, 1949.—Decided May 8, 1950.

Respondent was a member of the executive board of an association which was under investigation by the Committee on Un-American Activities of the House of Representatives. The Committee issued subpoenas to each of the members of the executive board, demanding that they produce in the committee room at a stated time certain of the association's records which were in the custody of the executive secretary of the association. The members of the executive board, acting together, had power to direct the executive secretary to produce the records and to remove her from office; but they held no meeting to consider compliance with the subpoena. They appeared in response to the subpoenas but the records were not produced. In identical prepared statements to the Committee, each asserted that he did not individually have custody of the records and was therefore unable to comply with the subpoena. Asked whether she personally would permit the Committee to see the books, respondent answered: "I don't think it is pertinent to say what I should do a week from now." She was indicted, tried and convicted for willful default under R. S. § 102, 2 U. S. C. § 192. *Held:*

1. The question of the lack of a quorum of the Committee, raised for the first time at the trial, and the question of the admissibility of testimony given before the Committee at the trial for willful default, are governed by the decision in *United States* v. *Bryan, ante*, p. 323. P. 352.

2. The fact that respondent had no *individual* control over the records was no defense. Pp. 356–358.

(a) When one accepts an office of joint responsibility, in which compliance with lawful orders requires joint action by the body of which he is a member, he necessarily assumes an individual responsibility to act, within the limits of his power, to bring about compliance with such an order. Pp. 356–357.

(b) The fact that the organization here involved was an unincorporated association rather than a corporation is immaterial. P. 358.

3. After introducing evidence that the executive board had power to produce the records and that it had not done so, the Government

did not have the further burden of proving that each individual member had not done that which was within his power to bring about compliance with the Committee's order. Pp. 358–364.

(a) The doctrine that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control, is applicable here. Pp. 360–361.

(b) In the absence of evidence that respondent made some effort to bring about compliance with the subpoena or had some excuse for failing to do so, the evidence adduced by the Government amply sustained the conviction. P. 364.

4. The subpoena was not defective by reason of the fact that it was addressed not to the association by name but to respondent as a member of the executive board. Pp. 353–354, n. 4.

84 U. S. App. D. C. 388, 174 F. 2d 519, reversed.

Respondent was convicted of willful default under R. S. § 102, 2 U. S. C. § 192, for failure to comply with a subpoena of the Committee on Un-American Activities of the House of Representatives. The Court of Appeals reversed. 84 U. S. App. D. C. 388, 174 F. 2d 519. This Court granted certiorari. 338 U. S. 846. *Reversed*, p. 365.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Campbell, Robert S. Erdahl, Philip R. Monahan* and *Felicia H. Dubrovsky*.

O. John Rogge and *Benedict Wolf* argued the cause and filed a brief for respondent.

Mr. Chief Justice Vinson delivered the opinion of the Court.

Respondent Fleischman is a member of the executive board of an organization known as the Joint Anti-Fascist Refugee Committee (hereinafter referred to as the asso-

ciation), which, during 1945 and 1946, was under investigation by the House Committee on Un-American Activities. In furtherance of its investigation, the Committee issued subpoenas on March 29, 1946, to each of the members of the executive board and to Helen R. Bryan, the executive secretary of the association, demanding that they produce certain of the association's records in the Committee's chamber on April 4, 1946. Fleischman and the other members of the board appeared on that date in response to the subpoenas but did not produce the records. The Committee thereupon reported to the House that the members of the executive board were in contempt of that body. After debate, the House voted to direct the Speaker to certify the Committee's report to the United States District Attorney for legal action.

Respondent and the other members of the executive board were jointly indicted for wilful default under R. S. § 102,[1] but Fleischman was tried separately from the others. Her defense, like that of Bryan,[2] consisted in part in the contention that she could not be guilty of wilful default because a quorum of the Committee had not been present when she appeared in response to the subpoena. The trial court withdrew that issue from the jury, holding "as a matter of law, that the Committee

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[1] 11 Stat. 155, as amended, R. S. § 102, 2 U. S. C. § 192:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

[2] See *United States* v. *Bryan, ante,* p. 323.

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on Un-American Activities of the House of Representatives was a validly constituted committee of Congress, and was at the time of the defendant's appearance." The Court of Appeals for the District of Columbia reversed, one judge dissenting, 84 U. S. App. D. C. 388, 174 F. 2d 519, on the ground that presence of a quorum of the Committee at the time of respondent's appearance was a material question of fact for the jury. The court also divided on the question of whether there was sufficient evidence to support the conviction, a majority holding the evidence sufficient. We granted a writ of certiorari, 338 U. S. 846, to consider these important questions arising under R. S. § 102.

The quorum question is governed by our decision this day in *United States* v. *Bryan, ante,* p. 323. Like Bryan, respondent testified before the Committee on the return day of the subpoena without making any suggestion of lack of a quorum. That issue was raised for the first time at the trial, two years after her appearance before the Committee, where she had given other reasons for her failure to produce the documents. Under the circumstances disclosed by this record, we think the defense of lack of quorum was not available to her.

The question of the admissibility of her testimony before the House Committee at her trial for wilful default is likewise governed by our decision in the *Bryan* case, where we held that R. S. § 859, 18 U. S. C. § 3486, cannot be read to prevent the introduction of testimony of this kind at a trial for wilful default under R. S. § 102.

There remains the question of the sufficiency of the evidence to support the verdict of guilt in this case. That evidence consisted in part of the record of the Committee's unsuccessful efforts over a period of four months to obtain the books and papers of the association from its chairman and executive secretary, of which there is

evidence of respondent's knowledge.[3] Other evidence introduced may reasonably be taken to establish the following facts: Following its unsuccessful attempts to obtain the records from the chairman and executive secretary, the Committee issued subpoenas to all sixteen members of the executive board of the association, commanding them to appear on April 4, 1946, in the Committee's chamber, there to produce the records. The subpoena served on respondent was addressed to her as "a member of the Executive Board of the Joint Anti-Fascist Refugee Committee." [4] The board had power, its

[3] This evidence consisted of a resolution passed by the executive board on December 14, 1945, condemning the Committee's investigation and directing Miss Bryan to consult with an attorney with a view toward protecting the records from the Committee, and the minutes of a meeting of February 11, 1946, at which the executive board voted to instruct Dr. Barsky not to produce the records before the Committee, as he had been ordered to do. While respondent did not participate in either of these actions, her knowledge of the Committee's efforts to obtain the records and the board's previous actions with respect thereto was shown by evidence of her attendance of a board meeting in March, 1946, when Dr. Barsky reported concerning his appearance before the Committee on February 13, and the association's attorney was present and talked to the board about its legal position in the matter.

[4] The subpoena served on Mrs. Fleischman read as follows:

"BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

"To the Sergeant at Arms, or his Special Messenger:

"You are hereby commanded to summon Mrs. Ernestina G. Fleischman, 'Voice of Fighting Spain', 1 Columbus Avenue, New York City, a member of the Executive Board of the Joint Anti-Fascist Refugee Committee to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Hon. John S. Wood is chairman, and to bring with you all books, ledgers, records and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or sub-committee thereof, together with all correspondence and memoranda of com-

members acting jointly, to direct Miss Bryan to produce the records, to transfer custody of the documents to some other person, or to remove her from office.[5] But during the interval between March 29, when the subpoenas were

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munications by any means whatsoever with persons in foreign countries. The said books, papers and records demanded herein are for the period from January 1, 1945 up to and including the date of this subpoena, in their chamber in the city of Washington, on April 4, 1946, at the hour of 10:00 A. M. then and there to testify touching matters of inquiry committed to said Committee; and [she] is not to depart without leave of said Committee.

"Herein fail not, and make return of this summons. . . ."

It is now suggested that this subpoena is defective because addressed not to the association by name but to respondent as a member of the executive board of the association, and *Wilson* v. *United States*, 221 U. S. 361 (1911) and *Commissioners* v. *Sellew*, 99 U. S. 624 (1879) are distinguished on that ground. We can think of no clearer way of notifying respondent that she was required to perform her duty as a member of the governing board of the association than to serve an individual subpoena upon her, addressed to her in her official capacity as a member of the executive board, and calling for the production of papers which she knew were under the control of the executive board. This subpoena makes explicit what is merely implicit in subpoenas addressed to an organization by name and served on individual directors, as was done in the *Wilson* case.

[5] Mrs. Fleischman's testimony concerning the powers and authority of the executive board was as follows:

"The CHAIRMAN. There isn't any other authority higher than the executive board?

"Mrs. FLEISCHMAN. No.

"The CHAIRMAN. And on all matters of policy, direction of the activities of the Joint Anti-Fascist Refugee Committee, the executive board is the highest authority?

"Mrs. FLEISCHMAN. Yes.

"The CHAIRMAN. Now, as a member of that board—you say you are a member now?

"Mrs. FLEISCHMAN. Yes.

"The CHAIRMAN. As a member of that board are you now willing, so far as you personally are concerned, as a member of that board are

issued, and April 4, when its members appeared before the Committee, no meeting of the executive board was held to discuss compliance. A number of members of the board met in an attorney's office in New York on April 2, when he gave to each a typewritten statement to read to the Committee.

All of the members who had been subpoenaed appeared at the time and place specified in the subpoenas. No one produced the records. Each of the sixteen members of the board, including respondent, read or handed to the Committee the identically worded statements prepared by the association's attorney. These statements read:

> "I individually do not have possession, custody, or control over any of the material requested in the subpena which was served upon me. The books, records, and correspondence of the Joint Anti-Fascist Refugee Committee are in the possession, custody, and control of Miss Helen R. Bryan, the executive secretary of our organization, and she is the legal custodian of this material. Since I do not have either in my possession, custody, or control the books, records, and documents described in the subpena, I am unable to comply with your order to produce them."

Upon being questioned by the Committee as to whether she, individually, would give her consent to production of the books, respondent's answer was that that question

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you now willing to permit this committee of Congress to see those books and records called for in that subpena?

"Mrs. FLEISCHMAN. I don't know what I would do. *It would require a meeting of the board.*" (Emphasis supplied.)

There was also testimony that the board had power to transfer custody of the records from Bryan to some other person and that, in fact, the vote at the February 11 meeting had been on that very question.

was "not pertinent"; that she would decide only at a meeting of the board.

Respondent and the other members of the board were jointly indicted on a charge that they "appeared before the Congressional Committee in the City of Washington, District of Columbia, on April 4, 1946, but failed to produce the records called for in the subpoenas, as they had power to do, and thereby wilfully made default." As we have pointed out, there is evidence to support the charge that the records were under the joint control of the members of the executive board and that the individual members, acting together, had power to produce them. It is contended, however, that respondent (in this respect no different from any other member) had no *individual* control over the records, and that there is thus no evidence that the nonproduction of the records resulted from anything she personally did or omitted to do.

It seems elementary that the only manner by which a duty requiring the joint participation of several persons may be performed is by a combination of individual performances. And conversely, the failure to perform such a duty is the result of a failure by some or all of the persons who have been ordered to act together to discharge their responsibilities. This failure is not necessarily the result of a conspiracy, which premises an agreement of some kind. One may, either alone or in concert with others, fail to perform his individual part of a task requiring joint participation.

When one accepts an office of joint responsibility, whether on a board of directors of a corporation, the governing board of a municipality, or any other position in which compliance with lawful orders requires joint action by a responsible body of which he is a member, he necessarily assumes an individual responsibility to act,

within the limits of his power to do so, to bring about compliance with the order. It may be that the efforts of one member of the board will avail nothing. If he does all he can, he will not be punished because of the recalcitrance of others. *Commissioners* v. *Sellew,* 99 U. S. 624, 627 (1879). But to hold that, because compliance with an order directed to the directors of a corporation or other organization requires common action by several persons, no one of them is individually responsible for the failure of the organization to comply, is effectually to remove such organizations beyond the reach of legislative and judicial commands. This Court and the state courts which have considered the matter [6] have adopted a contrary view. In *Wilson* v. *United States,* 221 U. S. 361 (1911), Mr. Justice Hughes stated the proposition thus:

> "A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance *or fail to take appropriate action within their power for the performance of the corporate duty,* they, no less than the corporation itself, are guilty of disobedience

[6] For applications of this principle in the analogous situation presented by noncompliance with a mandamus, see *State* v. *City of Live Oak,* 126 Fla. 132, 170 So. 608 (1936); *Littlefield* v. *Town of Adel,* 151 Ga. 684, 108 S. E. 56 (1921); *Smith* v. *Lott,* 156 Ga. 590, 119 S. E. 400 (1923); *McCulloch* v. *State,* 174 Ind. 525, 92 N. E. 543 (1910); *Middle States Utilities Co.* v. *City of Osceola,* 231 Iowa 462, 1 N. W. 2d 643 (1942); *Kentucky Culvert Mfg. Co.* v. *Elliott County Fiscal Court,* 239 Ky. 797, 40 S. W. 2d 375 (1931); *State* v. *Minneapolis Street R. Co.,* 154 Minn. 401, 191 N. W. 1004 (1923); *Heather* v. *City of Palmyra,* 317 Mo. 1320, 298 S. W. 750 (1927); *Commonwealth* v. *Schmidt,* 287 Pa. 150, 134 A. 478 (1926); *Butler County* v. *Pittsburgh, H., B. & N. C. R. Co.,* 298 Pa. 347, 148 A. 504 (1929).

and may be punished for contempt." *Id.* at 376. (Emphasis supplied.) See also *Commissioners* v. *Sellew, supra.*[7]

Nor is a distinction to be drawn on the ground that a corporation was there involved while the Joint Anti-Fascist Refugee Committee is an unincorporated association. *Brown* v. *United States,* 276 U. S. 134, 141–142 (1928), makes it clear that a subpoena directed to an unincorporated association and its officers is equally valid. If the legislative committee had a right to demand the records, the directing officers of the association are quite as responsible for their production as if they were corporate officers. Cf. *United States* v. *White,* 322 U. S. 694 (1944).[8]

The question that remains is whether, after introducing evidence that the board had power to produce the records, that it had not done so, and that each member of the board had read the identical statements quoted above

[7] It is suggested that the *Wilson* case is distinguishable because it may be inferred from the fact that, according to Government counsel, the Government had been after the records "in one way or another" for nearly a month that the subpoenas *duces tecum* served upon the directors had been supplemented by oral orders. There is not one word in the *Wilson* record that supports such an inference. On the contrary, the grand jury's presentment was not for failure to obey any oral commands but "for failure to obey a certain subpoena issued out of this Court, dated October 28, 1910." *Vide* the following:

"The COURT: What is the presentment precisely?

"Mr. WISE [Government Counsel]: The Grand Jury presents that the corporation is in contempt of this court in not obeying the subpoena, that these gentlemen are in contempt of Court in that they have known and had actual notice of the subpoenas issued to the corporation requiring it to produce these books, and in defiance of this court and of its process have failed to take any action to have their corporation comply with the process, ..."

[8] The argument that respondent was tried and convicted upon a theory different from that upon which the evidence is here found sufficient to sustain the conviction is refuted by the record, which

as his reason for noncompliance, the Government has the further burden of proving that each individual member had not done that which was within his power to bring about compliance with the Committee's order. It may well be that respondent's prepared statement before the Committee and her answers to the Committee's questions are sufficient in themselves to satisfy that requirement. For they indicate clearly that respondent had assumed no personal duty to do anything. The prepared statement was, of course, a patent evasion of the Committee's demands. While stating that each member of the executive board *individually* did not have control over the records, it does not deny, as it could not, that the members had power *jointly* to comply with the subpoenas. Since the subpoenas required that they act jointly—the previous demands on the chairman and the executive secretary individually having been of no avail—the statement that the members *individually* had no power to comply is completely irrelevant.

And when the Committee asked respondent whether she, personally, would permit the Committee to have

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is full of discussion concerning the import of the *Wilson* case. The following is representative:

"MR. ROGGE [counsel for respondent]: . . . Let's look at the Wilson case again, which the Court of Appeals passed on [in *Barsky* v. *United States,* 167 F. 2d 241, 251]. It says if your members have the right to direct the corporation and fail to take appropriate action; in order to be free of guilt here did Ernestina have to be a propagandist and go to the board members and say before taking action—

"THE COURT (interposing): When she takes on the responsibility of an executive board member certain responsibilities flow along with that when she does it.

"MR. ROGGE: She is a member of the executive board. The evidence has shown that. . . . The record also shows that, what you get down to is that Ernestina, in order not to be guilty here, had to see to it that some sort of an affirmative action was taken, and I do not think that is required even under the Wilson case."

access to the books, her answer again was an evasion. She said: "I don't think it is pertinent to say what I should do a week from now."

The difficulty with that position is that it is not for her nor any other member of the board to say that she would make up her mind next week. The return day of the subpoena had arrived. No one so much as hinted that there had been no time to act. The members had gathered in an attorney's office on April 2, when they received their statements. There was evidence that some members had gathered informally elsewhere to discuss the question of compliance. In fact all were present in the anteroom of the Committee's chamber on the morning of April 4. If there had been the slightest bent toward compliance, the opportunities were there. When respondent appeared before the Committee, she was asked in effect, as of that time, whether she was a party to the joint refusal to produce the records: "Would you now, right here now, give your consent to this committee to [see the books and records]?" As one of the members of the Committee stated to respondent: "That is the main thing, the whole case." Her answer was no answer.

It may be argued, however, that respondent may have adopted the position of the other members of the board only after she had tried in good faith to bring about compliance with the subpoena. Or perhaps she had been ill or necessarily out of town immediately prior to April 4. Granting that these or other excuses for nonaction may exist, must the Government negative each, or was the burden on respondent to advance them as defensive matter?

We think that the circumstances of this case fairly bring into play the familiar doctrine in criminal cases that "it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circum-

stances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." *Rossi* v. *United States,* 289 U. S. 89, 91–92 (1933), and authorities cited. The considerations that govern this question have been well stated by Mr. Justice Cardozo in discussing a similar question—the constitutionality of a statute which shifted the burden of proof in a criminal prosecution to the defendant. He said:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.
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> . . . . .
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> ". . . For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . . , or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, Vol. 1, § 79.* The

*The Court's footnote reads: "Instances of the application of this principle can be cited in profusion. The cases that follow are typical examples: *King* v. *Turner,* 5 Mau. & Sel. 206, where a defendant having game in his possession in violation of a statute whereby possession was generally a crime, was held to have the burden of

list is not exhaustive. Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises." *Morrison* v. *California,* 291 U. S. 82, 88–91 (1934).[9]

In this situation, manifestly, the prosecution is under a serious practical handicap if it must prove the negative proposition—that respondent did not or had no good reason for failing to try to comply with the subpoena insofar as she was able. The possibilities of time and

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proving his special qualifications (cf. *Yee Hem* v. *United States,* [268 U. S. 178]; also *Spieres* v. *Parker,* 1 T. R. 144, per Lord Mansfield); *Fleming* v. *People,* 27 N. Y. 329, a prosecution for bigamy, where on proof that the defendant had contracted a second marriage during the lifetime of his first wife, the burden was laid upon him to prove exceptional circumstances that would have made the marriage lawful; and finally such cases as *Potter* v. *Deyo,* 19 Wend. 361, 363, and *United States* v. *Turner,* 266 Fed. 248 (typical of a host of others) where a defendant has been subjected to the burden of producing a license or a permit for a business or profession that would otherwise be illegal. Cf. *United States* v. *Hayward,* 26 Fed. Cas. 240; *Board of Comm'rs* v. *Merchant,* 103 N. Y. 143; 8 N. E. 484."

[9] See also *Williams* v. *United States,* 78 U. S. App. D. C. 147, 138 F. 2d 81 (1943). In *Tot* v. *United States,* 319 U. S. 463 (1943), this Court refused to uphold a federal statute creating a presumption that firearms found in the possession of one who has previously been convicted of a crime of violence were received by him in interstate or foreign commerce after July 30, 1938, on the ground that the presumption is "inconsistent with any argument drawn from experience." *Id.* at 468.

circumstance are of such wide range as to defy inclusive rebuttal. On the other hand, the burden of the affirmative was not an oppressive one for respondent to undertake; the relevant facts are peculiarly within her knowledge. She was called upon merely to introduce evidence as to what steps she took after receiving the subpoena, or, if she took no action, any evidence tending to excuse her omission. Respondent does not lose the presumption of innocence that surrounds the defendant in a criminal prosecution. That presumption continues to operate until overcome by proof of guilt beyond a reasonable doubt and is not to be confused with burden of proof, which is a rule affecting merely the time and manner of proof. See 1 Wharton, Criminal Evidence (11th ed.) §§ 199–204.[10]

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[10] This conclusion is buttressed by the fact that such a burden ordinarily is cast upon members of the governing boards of corporations and associations which have not complied with court orders, when they are brought into court on contempt charges. In *Wilson* v. *United States*, 221 U. S. 361 (1911), where Wilson, the president of the corporation, had custody of the books and had removed them to his home, the corporation and five of its directors were served with subpoenas to produce. The directors appeared in court and were not held in contempt although they did not produce the books because, as this Court noted in its opinion: "On behalf of the directors before the court it was stated that they had made efforts to obtain the books for production before the grand jury, but that Wilson had declined to surrender them. They presented the minutes of a meeting of the board of directors held on that day at which these directors [*i. e.* those who had been served with subpoenas], constituting a majority of the board, had passed a resolution demanding of Wilson the possession of the letter press copy books called for by the subpoena 'for the production of the same before the Federal Grand Jury.'" *Id.* at 371. Again, in contrasting Wilson's actions with those of the directors, the Court stated: "The appellant did not attempt to assert any right on [the corporation's] part; his conduct was in antagonism to the corporation, so far as its attitude is shown. A majority of the directors, not including the appellant,

Even though we assume, therefore, contrary to the reasonable inferences to be drawn from respondent's statements before the Committee, that she may have made some effort to bring about compliance with the subpoena, or had some excuse for failing to do so, we think that under the circumstances here presented the burden was upon her to present evidence to sustain such a defense. And, in the absence of such evidence, we conclude that the evidence adduced by the Government amply sustains the conviction. Respondent is no more or less guilty than any other member of the board. If she can escape prosecution by remaining quiescent, so can all the others. If hers is a valid defense, then all that the directors of a corporation need do when they and the corporation are served with subpoenas is to refrain from discussing compliance with the order. No one need make any attempt to comply, for none of them "individually" has control over the action—or nonaction—of the corporation. A stratagem so transparent does not cast a shadow of substance.[11]

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appeared before the court and urged their solicitude to comply with the writ. They presented their formal action, taken at a meeting of the board, in which they demanded of the appellant the delivery of the books for production before the grand jury." *Id.* at 376. In considering this practice it should be noted that in criminal contempts, as in criminal cases, the presumption of innocence obtains; proof of guilt must be beyond a reasonable doubt; and the defendant may not be compelled to be a witness against himself. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444 (1911); *United States* v. *Goldman*, 277 U. S. 229, 235–236 (1928); *Michaelson* v. *United States*, 266 U. S. 42, 67 (1924).

[11] The proposition that one who tries but fails to obtain compliance with a subpoena requiring the joint action of several persons has made a useless and "empty gesture" which should not be compelled by the courts overlooks the fact that if enough members of the governing body make the attempt required by the subpoenas their joint effort will ordinarily be successful. In the *Wilson* case itself

It should be emphasized that we are not dealing with the duties of witnesses summoned by one committee but with the obligations owed by persons summoned by authority of the Senate or House of Representatives to appear before any person or group designated by that authority. Reforms in the practices and procedures of certain committees are vigorously demanded by persons both within and without Congress. We would not be understood in this case as expressing either approval or disapproval of those practices. But the remedy, if any is needed, is certainly not to destroy the effective operation of all committees, which is the necessary result if they cannot compel the disclosure of facts. A subpoena is a sterile document if its orders may be flouted with impunity.

Respondent advances a number of contentions which were not passed upon by the Court of Appeals. We do not decide them at this time. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, with whom MR. JUSTICE FRANKFURTER concurs, dissenting.

The Court holds that there is sufficient evidence in this record to support the conviction of respondent Fleischman under R. S. § 102. I cannot agree. Whether the evidence is sufficient depends primarily on what conduct is made criminal by R. S. § 102 and what action is re-

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the difference between imprisonment of the directors for contempt and their acquittal was their "empty gesture" of calling upon Wilson to produce the records. See note 10, *supra*.

quired by a subpoena *duces tecum*. My views on these questions differ so drastically from those of the Court that I shall present them, and the conclusions which they dictate, before turning to the Court's opinion.

I.

R. S. § 102 provides: "Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers . . . willfully makes default, . . . shall be deemed guilty of a misdemeanor . . . ." This criminal statute is limited by its terms to just two types of congressional orders: (1) a subpoena to give testimony, and (2) a subpoena to produce papers. The latter type of order is involved here.

Refusal to comply with a subpoena to produce papers can be punished only if the witness has power to produce. It is a complete defense for him to show that the papers are not in his possession or under his control. For a subpoena *duces tecum* does not require a witness "to sue and labor in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself . . . ." *Munroe* v. *United States*, 216 F. 107, 111–112, quoting Lord Ellenborough's opinion in *Amey* v. *Long*, 9 East 473, 483; see the general discussion in Notes, 1915B L. R. A. 980–985; 32 Am. St. Rep. 648. A command to produce is not a command to get others to produce or assist in producing. Of course Congress, like a court, has broad powers to supplement its subpoena with other commands requiring the witness to take specific affirmative steps reasonably calculated to remove obstacles to production. But even though disobedience of such supplementary orders can be punished at the bar of Congress as contempt, *Jurney* v. *MacCracken*, 294 U. S. 125, it does not come within the limited scope of R. S. § 102. Only by importing the broad contempt powers of Congress into this criminal statute can this Court say that

it does. I cannot agree to such cavalier expansion of any criminal provision.

Prosecution under R. S. § 102 is thus limited to a range far narrower than is a proceeding for contempt, either in court or at the bar of Congress. And even under the notoriously broad contempt power, punishment is justifiable only when a person has failed to comply with an order specifying precisely what he must do, and when he has power himself to do what is ordered.[1] Certainly no less precise standard should be established in prosecutions for violation of a criminal statute. *Cf. Pierce* v. *United States,* 314 U. S. 306, 310–311.

Viewed in this light, the evidence in this case unmistakably falls short of proving that Fleischman disobeyed the subpoena or violated the statute. The Government did succeed in establishing that she had received the subpoena, knew approximately what documents she was required to produce, and yet failed to produce them. But an essential ingredient of the offense—that she had *power* to produce those records on April 4—remains completely unsubstantiated.[2] The Government does not contend that Fleischman had power to produce except by acting jointly with other members of the board. And, for the reasons stated above, the subpoena addressed to Fleischman as an individual board member imposed on her no duty to prod others to produce, or to initiate joint action aimed at production.[3]

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[1] The two components of this general principle and their application to this case are discussed in II (A) and II (D) *infra.*

[2] The Court's attempt to offset this deficiency is discussed in II (D) *infra.*

[3] Whether joint action would have been required by a subpoena addressed to the board is completely irrelevant for the reasons set out in note 4 *infra.* It should be noted, however, that an order to the board as an entity necessarily implies joint action; one addressed to an individual member does not. Moreover, the former is sufficiently

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Because of the limited scope of R. S. § 102 and the complete absence of proof that Fleischman had power to produce the subpoenaed documents, her conviction of the crime created by that statute should be set aside.

II.

The Court does not dispute that the evidence is insufficient to uphold Fleischman's conviction under the established principles outlined above. Rather it constructs a novel legal theory which, however plausible on the surface, will not stand detailed analysis.

The chain of reasoning on which its legal theory hangs appears to be this: Fleischman and other members of the executive board were served with separate subpoenas ordering each to produce papers of the association on April 4; Bryan, the executive secretary, had possession of the papers; the individual subpoenas imposed on each board member a personal duty to do all each could to bring about joint action that would cause production; had Fleischman performed her individual part of this joint task, she might have prevailed on the board to pass a resolution which might have forced Bryan to produce; Fleischman failed to show that she had done all she could to bring about that result; therefore Fleischman was properly convicted of the crime of wilfully disobeying the subpoena addressed to her as an individual member of the board.

In this intricate chain, certain crucial links are entirely missing and others are far too weak to sustain a criminal conviction:

A. The foundation of the Court's theory is that a subpoena *duces tecum* addressed to an individual board mem-

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specific if it tells the *board* exactly what to do; the latter must tell the *individual* what to do. In either case, the recipient must have power to do what is ordered before punishment is justified.

ber includes the command that he do "all he can" to bring about joint board action to produce the subpoenaed papers.[4] This doctrine expands the scope of the subpoena *duces tecum* far beyond its traditional boundaries, which are outlined in Part I *supra*. No precedent for such an expansion can be found in the two cases relied on by the Court.

Commissioners v. *Sellew*, 99 U. S. 624, merely approved issuance of a writ of mandamus to a county commission ordering specific action on a specific date as specifically required by Kansas statutes. Such is the traditional function of mandamus. Seldom has a judicial order been more explicit. In sharp contrast to Fleischman, the commissioners were not required to hazard the least guess as to what action would satisfy the judicial mandate. Both that mandate and the applicable state statutes told them precisely what to do.[5]

Nor does the opinion in *Wilson* v. *United States*, 221 U. S. 361, support today's holding that an order to produce papers requires a person, without further orders, to take action getting others to produce. The Court relies on a dictum that corporate officials can be required to take "appropriate action" to secure performance of a corporate duty. Even the dictum, however, must be read in the context of that case. Wilson, the president of a corporation to which a subpoena was addressed, had actual custody of the subpoenaed records. Appearing before the grand jury with several corporation directors, he re-

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[4] While a subpoena was also addressed to the board as an entity, there is utterly no evidence that Fleischman ever knew of it. Therefore, like the Court, we treat the case as if no board subpoena had ever been issued.

[5] The string of mandamus cases cited in note 6 of the Court's opinion are equally inapplicable for the same general reason. No case cited supports the Court's position.

fused to produce. The directors denied power to make him do so. In the resulting contempt proceedings, the prosecuting attorney complained that the Government had been after the records "in one way or another before this same Grand Jury for nearly a month." He emphasized that many of the directors had frequently appeared before the grand jury, and indeed had spent the entire preceding day there.[6] In view of the frequent and prolonged appearances of the directors before the grand jury, even a passing acquaintance with how a grand jury operates would make it inconceivable that "one way or another" did not include oral orders to take action aimed at forcing Wilson to turn over the records. Whether such orders were specific enough to justify holding the directors in contempt, or whether failure to take any action would justify punishment for violation of the subpoena itself without first ordering the directors to take specific steps, became immaterial when the directors passed a resolution ordering Wilson to produce. The directors were found innocent, and the only issues before this Court involved Wilson's guilt. Read in this context, the dictum on which the Court relies affords no support whatever for its conclusion here that a subpoena, of itself, imposes the amorphous duty of "appropriate action" to get others to produce. Moreover, citation of the *Sellew* case as authority for the dictum clearly indicates that the "appropriate action" would have to be designated and commanded by specific orders. Nothing in the *Wilson* opinion can fairly be interpreted as supplanting, or even casting doubt on, the traditional rule that failure to take action required by an order can be punished only

[6] It should be noted that the directors appeared in response to a subpoena addressed to the corporation. Unlike Fleischman, they were not subpoenaed individually. See note 3 *supra*.

if the action is clearly, specifically, and unequivocally commanded by that order.[7]

Apparently the only reason given for discarding this rule is the Court's statement that failure to construe an individual subpoena as requiring joint action by members of a board would "remove such organizations beyond the reach of legislative and judicial commands." That fear is without foundation. A custodian wilfully failing to produce records can be prosecuted under R. S. § 102. And under 18 U. S. C. § 3, anyone "aiding or abetting" her also becomes a principal in that offense and is similarly subject to R. S. § 102. Moreover, a conspiracy to prevent production would certainly provide grounds for conviction. Thus there is no question that Fleischman's conviction could be sustained if there had been sufficient evidence that she actually aided or encouraged the custodian's refusal to produce, or conspired to accomplish that result.[8] And in the rare instance where these sanc-

[7] See, *e. g.*, *McFarland* v. *United States*, 295 F. 648, 650: "Certainly before one may be punished for contempt for violating a court order, the terms of such order should be clear and specific, and leave no doubt or uncertainty in the minds of those to whom it is addressed." See also *Berry* v. *Midtown Service Corp.*, 104 F. 2d 107, 111, 122 A. L. R. 1341, and *Labor Board* v. *New York Merchandise Co.*, 134 F. 2d 949, 952. In the latter case the court, in an opinion by Judge Learned Hand, characterizes as "cardinal" the rule that "no one shall be punished for the disobedience of an order which does not definitely prescribe what he is to do." For application of the same general rule to contempt proceedings for enforcement of a court decree, see *Terminal R. Assn.* v. *United States*, 266 U. S. 17, 29.

[8] One count of the indictment actually charged Fleischman and other members of the board with conspiracy. That count was dismissed. As for Fleischman's guilt as an "aider and abettor," that question was submitted to the jury by the trial judge's charge. In affirming, this Court does not even suggest that there was evidence to show that Fleischman had ever aided or encouraged Bryan or

tions seem unlikely to secure compliance, Congress can always fall back upon its arsenal of supplementary orders enforced by congressional contempt proceedings: [9] officers with authority to call a board meeting can be ordered to do so, and board members can be ordered to vote for resolutions calculated to foster production. It can be safely presumed that any organization capable of escaping this barrage would not be brought into line by today's expansion of R. S. § 102. A subpoena is not made "sterile" by holding that it commands only what it says it commands.

In fact, the Court's new doctrine creates a danger far more genuine than what it allegedly avoids. While in contempt proceedings a witness in doubt as to just what action is demanded can be given more precise orders before a tribunal decides to punish him for noncompliance, no such flexibility exists in criminal prosecutions under R. S. § 102. As applied to such prosecutions, the sweeping requirement that a witness not having custody or control of subpoenaed documents must do "all he can" to secure their production places him in an unfair dilemma. Caution dictates that he "sue and labor" to obtain the papers, however great and however useless the effort and expense. On the other hand, common sense counsels that he make such practical efforts as would satisfy a reasonable jury—and not until the jury has spoken will he know whether he guessed right.

Not even after today's opinion can Fleischman—or, for that matter, anyone else—know precisely what steps were

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anyone else. That Fleischman's conviction cannot be upheld under existing doctrines does not establish the inadequacy of those doctrines for any purpose except convicting one whose guilt as charged has not been proven.

[9] See Part I *supra*.

required of her to encourage production of documents which she herself could not produce.[10]

B. Even if the theory on which this Court upholds Fleischman's conviction were tenable, it is, as might be expected from its novelty, completely different from the theory on which the case was tried. An essential element in the trial judge's charge was his instruction that the jury could find Fleischman guilty only if it found that she had "acted in concert with other members of the executive board" to prevent production. But the Court, without even attempting to support her conviction on this theory, substitutes a theory involving completely different problems of proof and evidence.[11] The issue of whether Fleischman had failed to attempt to persuade others to produce was not being tried, and there was no reason for her to introduce evidence concerning it. The question on review is not whether the record as a whole exudes a general impression of guilt, but whether the evidence supports a finding of guilt on the issues presented to the jury by the trial judge's charge. *Bollenbach* v. *United States,* 326 U. S. 607, 614. This Court should heed its mandates forbidding state appellate courts to uphold convictions on any theory materially different from that on which the case was presented to the jury. See *Cole* v. *Arkansas,* 333 U. S. 196, 201–202.

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[10] There is not the slightest indication that anything Fleischman could have done even had a prospect of fostering compliance with the subpoena. See II (D) *infra.* Apparently Fleischman's conviction is being upheld because she failed to make some undefined empty gesture.

[11] The Court attempts to justify its change of theories by quoting from a bench argument between Fleischman's attorney and the trial judge. Such an argument cannot alter the theory on which the case was submitted to the jury by the judge's charge.

C. The Court relies heavily on statements made by Fleischman before the congressional committee. But these statements are expressly made inadmissible by 18 U. S. C. § 3486, which provides that no testimony given by a witness before any committee of either house "shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony." See *United States* v. *Bryan, ante,* pp. 323, 346.

Nor does Fleischman's testimony, even if admissible, support the inferences drawn from it by this Court. Weighty significance is attached to her refusal to say how she would vote on the question of production if a board meeting were held. Suffice it to say that no meeting had been held following her receipt of the subpoena, no future meeting had any relevance whatever to the past offense with which she was charged, and the subpoena did not order her to take action at a board meeting anyway. See Part I *supra.*

Equally unwarranted is the inference drawn by the Court from the fact that Fleischman and other board members read the same statement denying individual possession or control over the subpoenaed documents. The Court refers to this statement, prepared by a lawyer, as a "patent evasion" of the committee's order. On the contrary, I regard the denial of individual power to produce as a complete and adequate response to the individual subpoenas. And surely, although the Committee would not permit counsel for witnesses to enter the committee room, witnesses have always been entitled to get advice from a qualified lawyer and present a statement prepared by him without having inferences of guilt drawn from that fact.

D. Power to produce is an essential ingredient of any offense under R. S. § 102, and the indictment necessarily

alleged that "each and all" of the board members had such power. Thus proof of Fleischman's power to produce the subpoenaed papers is undeniably vital to the Court's theory of the case.

The only evidence tending to show power in the board itself to produce is that it had authority over the policies and activities of the association, and had power to suspend Bryan at any regular board meeting.[12] Assuming that the board could have ordered Bryan to produce under threat of suspension, the *Wilson* case demonstrates that prospective obedience to such a potential board order cannot accurately be inferred merely from the supremacy of a board. And this record is barren of any evidence to support a finding that Bryan would have complied on April 4th with a board order.

Equally important under the Court's theory is the question of Fleischman's own power to bring about production. The Court holds that membership on the board gave her one-eighteenth of the board's official "power," which it considers enough to support conviction. But her fraction of official "power" could be exercised only at an official meeting. There is no showing that any meeting was held between March 29 and April 4, or that Fleischman had power to call such a meeting.[13] And I do not understand

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[12] Even this evidence comes primarily from Fleischman's testimony before the congressional committee, and should therefore be held inadmissible. See *United States* v. *Bryan*, *ante*, pp. 323, 346.

[13] The Court intimates that Fleischman could have called a meeting when members of the board were gathered in an attorney's office on April 2d, or an informal gathering of members elsewhere. It should be noted that the prosecutor labored valiantly at the trial to establish that Fleischman visited the attorney's office or attended some informal meeting. He failed completely in this effort. Despite repeated questions to several witnesses, not one response was evoked indicating that Fleischman ever saw or communicated with a single board member during the interval between the time she was subpoenaed and the time the members met in the anteroom of the

the Court to say that the "power to produce" which Fleischman criminally failed to exercise was solely some imagined personal ability, unconnected with her official capacity, to attempt to cajole the chairman into calling a meeting or ordering production.

Upon a showing merely that the board controlled the "policies and activities" of the association and that she was a board member, the Court imposes on Fleischman the burden of disproving the crucial allegation of "power to produce" by establishing that she had done "all she could" to bring about production. In effect it has set up a presumption that every board member automatically has such power, and has saddled Fleischman with the burden of proving her innocence by showing that the presumption should not apply to her.[14] In the absence of some showing that she had authority to call or an opportunity to vote at an official board meeting, or at least had substantial influence over other board members, this is every bit as arbitrary as the presumption rejected in *Tot* v.

Committee. As for the suggestion that Fleischman might have called a meeting in the anteroom of the Committee's chambers, it is strange doctrine to assert that the Committee's command that all members appear was enough to require automatically that each member call a meeting. If that was what the Committee wanted, it could have ordered a meeting itself.

In any event, "opportunity" to call a meeting cannot be equated with official "power" to call a meeting. There is no evidence even intimating that she had such authority.

[14] This theory sharply contrasts with the established principle that corporate and association officials, like other persons, can be held guilty only for their own crime, and not for the crimes of their associates in which there is no proof that they participated. Any contrary doctrine is a startling innovation in the laws of this country. See *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 406–407. See also cases collected in Notes, 33 A. L. R. 787; 16 L. R. A. (N. S.) 333; 8 Ann. Cas. 383.

United States, 319 U. S. 463.[15] That case directly bars use of such a device to shift the burden of proof, however convenient it would be for the prosecutor. And without that device, the Government's case was clearly insufficient to support the verdict.

The time-honored rule, that the Government is required to prove every essential ingredient of an offense it charges, provides a safeguard essential to preservation of individual liberty against governmental oppression. It should not be sacrificed in order to sustain the conviction of a single defendant whose guilt the Government has plainly failed to prove.

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If the Court's theory merely had any one of the above flaws, its chain of reasoning would break. With all four, it collapses. The judgment of the Court of Appeals should be affirmed.

MR. JUSTICE FRANKFURTER, dissenting.

Anyone who "willfully makes default" in obeying a valid subpoena to produce records before a committee of Congress has, ever since 1857, been guilty of a federal

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[15] See note 9 of the Court's opinion.

Under the *Tot* rule, the minimum justification for such a presumption would be general experience that the most insignificant member of a board has power, if she "does all she can," to secure board production of documents held by its custodian. Experience not only fails to support this premise; as anyone familiar with the loose-jointed structure of nonprofit associations should know, most members or most boards are wholly subordinate to the executive secretary and the chairman. This is one of the "many significant respects" in which such associations obviously differ from business corporations. *See United States* v. *White*, 322 U. S. 694, 697. Not a single line in *Rossi* v. *United States*, 289 U. S. 89, or *Morrison* v. *California*, 291 U. S. 82, supports the "presumption" retroactively created here. As a basis of "power to produce," mere board membership is no substitute for possession, custody or control.

offense. Act of January 24, 1857, 11 Stat. 155, R. S. § 102, as amended by Joint Resolution of June 22, 1938, 52 Stat. 942, now 2 U. S. C. § 192. This was the offense for which respondent was prosecuted. The trial court thus put to the jury the theory of the prosecution:

> "If you find that the members of the executive board, directly or indirectly, had custody or dominion and control over the records subpoenaed and could have produced the records called for, but wilfully failed and refused to do so, and that the defendant Fleischman acted in concert with other members of the executive board, either throughout or at any point, to prevent the committee from getting the subpoenaed records, then you may find the defendant Fleischman guilty, if you find that the other elements hereinafter set out have been proved by the United States beyond a reasonable doubt."

The only "other element" that bears on the issue of the sufficiency of the evidence was the court's explanation that the requirement that the default be made "willfully" means that the default must be "deliberate and intentional."

The indictment against respondent also had a count charging her and others with conspiring to make willful default of congressional subpoenas. It is inappropriate to consider whether the evidence would have been sufficient to bring respondent within the expansive range of a conspiracy charge or whether evidence that could have been admitted under such a charge but was not admissible in this trial would have sufficed to prove guilt. For its own good reasons the Government dismissed the conspiracy charge against Fleischman. A careful study of the record compels the conclusion that Edgerton, J. conveyed fairly and in balance all that the Government

proved against respondent on the charge on which she was tried:

> "Appellant testified without contradiction that she could not produce the records because they were not in her possession or control. She refused to express either willingness or unwillingness that they be produced.* Even this refusal did not occur until she was questioned by members of the Congressional Committee on April 4. The records were in possession of one Bryan, subject to control by an Executive Board of about 18 members of whom appellant was one. Long before April 4 Bryan, directed by other members of the Board but not by the appellant, had determined not to produce the records. There is no evidence that appellant ratified or approved the action of the other members of the Board. The government says 'In taking part in a combined action to withhold records from a Congressional Committee the appellant acted at her own peril.' But I have not been able to find any evidence, and no evidence has been pointed out, that the appel-

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* "'The Chairman: Mrs. Fleischman; I am going to ask you now for your personal permission. I am requesting you personally to permit this committee of Congress to have access to those books. Will you give it to us or not? So far as you are able to do, will you give it to us?

"'Mrs. Fleischman: That is expressing my opinion, Mr. Chairman. I cannot say what the board will do.

"'The Chairman: I am not asking what the board will do. I am asking what you will do.

"'Mrs. Fleischman: I do not know, because the thing comes to the board to discuss, and I don't think it is pertinent to say what I should do a week from now. It is a special meeting.'

"I know of nothing else in the record that comes nearer than this to supporting an inference that appellant refused to produce the records or expressed unwillingness to produce them."

lant took part in a combined action to withhold records. It has been suggested that she might have asked the Board, or Bryan, to produce the records. But there is no evidence that if she had asked them they would have complied. There is no evidence that the nonproduction of the records in the committeeroom resulted either from anything the appellant did or from anything she omitted to do." 84 U. S. App. D. C. 388, 390, 174 F. 2d 519, 521.

The respondent was summoned to produce papers before a congressional committee and did not produce them. For this non-action she was prosecuted as a person who "willfully makes default" in not producing the papers. I believe in giving penal statutes a scope their words would receive "in everyday speech." *McBoyle* v. *United States*, 283 U. S. 25, 26, and see *Roschen* v. *Ward*, 279 U. S. 337, 339. If language in a criminal statute is to be read with the normal meaning of English speech, "willfully makes default" surely conveys the thought of a substantial tie between the non-production of papers and the non-action to which it is attributed. This record is barren of the proof which under our system of punitive justice would have warranted a jury to find that respondent was actively or passively responsible for the non-production of the papers she was asked to produce.

This conclusion does not imply the slightest relaxation of the duty of obedience to the lawful commands of congressional committees in exercising their power of testimonial compulsion. *McGrain* v. *Daugherty*, 273 U. S. 135. But regard for that power does not call for the slightest relaxation of the requirements of our criminal process. A penal statute must not be applied beyond its terms, and the crime defined by it and charged in an indictment must be established by proof beyond a reasonable doubt.

It may well be that the House committee should have asked respondent to try to have convened a meeting of the executive board with a view to asking the custodian of the records to produce them. Such a procedure is suggested by what was done in *Wilson* v. *United States,* 221 U. S. 361, 370–71. Had respondent refused she would have subjected herself to a contempt proceeding for disobedience of a command of the committee. But this is not such a proceeding. As to the offense for which she was prosecuted, I agree with Judge Edgerton that an acquittal should have been directed.

AMERICAN COMMUNICATIONS ASSN., C. I. O., ET AL. *v.* DOUDS, REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD.

NO. 10. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.*

Argued October 10–11, 1949.—Decided May 8, 1950.

Section 9 (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, which imposes certain restrictions on, and denies the benefits of certain provisions of the National Labor Relations Act to, any labor organization the officers of which have not filed with the National Labor Relations Board the so-called "non-Communist" affidavits prescribed by § 9 (h), is valid under the Federal Constitution. Pp. 385–415.

1. One of the purposes of the Labor Management Relations Act was to remove the obstructions to the free flow of commerce resulting from "political strikes" instigated by Communists who had infiltrated the management of labor organizations and were subordinating legitimate trade-union objectives to obstructive strikes when dictated by Communist Party leaders, often in support of the policies of a foreign government. Pp. 387–389.

2. Section 9 (h) does not merely withhold from noncomplying unions benefits granted by the Government; it also imposes on them a number of restrictions which would not exist if the National Labor Relations Act had not been enacted. However, it does not prohibit persons who do not sign the prescribed affidavit from holding union office. Pp. 389–390.

3. The remedy provided by § 9 (h) bears reasonable relation to the evil which it was designed to reach, since Congress might reasonably find that Communists, unlike members of other political parties, and persons who believe in the overthrow of the Government by force, unlike persons of other beliefs, represent a continuing danger of disruptive political strikes when they hold positions of union leadership. Pp. 390–393.

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*Together with No. 13, *United Steelworkers of America et al.* v. *National Labor Relations Board*, on certiorari to the Court of Appeals for the Seventh Circuit, argued October 11, 1949.

4. Section 9 (h) is designed to protect the public, not against what Communists and others identified therein advocate or believe, but against what Congress has concluded they have done and are likely to do again; and the probable effects of the statute upon the free exercise of the right of speech and assembly must be weighed against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9 (h) pose continuing threats to that public interest when in positions of union leadership. Pp. 393–400.

5. In view of the complexity of the problem of political strikes and how to deal with their leaders, the public interest in the good faith exercise of the great powers entrusted by Congress to labor bargaining representatives under the National Labor Relations Act, the fact that § 9 (h) touches only a relatively few persons who combine certain political affiliations or beliefs with the occupancy of positions of great power over the economy of the country, and the fact that injury to interstate commerce would be an accomplished fact before any sanctions could be applied, the legislative judgment that interstate commerce must be protected from a continuing threat of political strikes is a permissible one in this case. Pp. 400–406.

6. The belief identified in § 9 (h) is a belief in the objective of overthrow by force or by any illegal or unconstitutional methods of the Government of the United States as it now exists under the Constitution and laws thereof. The sole effect of the statute upon one who holds such beliefs is that he may be forced to relinquish his position as a union leader. So construed, in the light of the circumstances surrounding the problem, § 9 (h) does not unduly infringe freedoms protected by the First Amendment. Pp. 406–412.

7. Section 9 (h) is not unconstitutionally vague; it does not violate the prohibition of Article I, § 9 of the Constitution against bills of attainder or ex post facto laws; and it does not require a "test oath" contrary to the provision of Article VI that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Pp. 412–415.

79 F. Supp. 563, 170 F. 2d 247, affirmed.

No. 10. Although the officers of appellant union had not filed with the National Labor Relations Board the affidavit prescribed by § 9 (h) of the National Labor

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Relations Act, as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, 146, 29 U. S. C. (Supp. III) §§ 141, 159 (h), appellant, claiming that the section was unconstitutional, sued to restrain the Board from holding a representation election in a bargaining unit in which appellant was the employee representative, until a hearing was granted to appellant. The three-judge district court dismissed the complaint. 79 F. Supp. 563. On appeal to this Court, *affirmed,* p. 415.

No. 13. On an unfair labor practice complaint filed with the National Labor Relations Board by petitioner unions, the Board found that the employer had violated the National Labor Relations Act in refusing to bargain on the subject of pensions; but the Board postponed the effective date of its order compelling the employer to bargain, pending the unions' compliance with § 9 (h). 77 N. L. R. B. 1. The Court of Appeals sustained the Board's action on both counts. 170 F. 2d 247. This Court denied certiorari on the pension issue, 336 U. S. 960, but granted certiorari on an issue regarding the constitutionality of § 9 (h). 335 U. S. 910. *Affirmed,* p. 415.

Victor Rabinowitz argued the cause for appellants in No. 10. With him on the brief was *Leonard B. Boudin. Samuel A. Neuburger* was also of counsel.

Thomas E. Harris argued the cause for petitioners in No. 13. With him on the brief were *Arthur J. Goldberg* and *Frank Donner.*

Solicitor General Perlman argued the cause for appellee in No. 10 and respondent in No. 13. With him on the briefs were *Robert L. Stern, Stanley M. Silverberg, Robert N. Denham, David P. Findling, A. Norman Somers, Mozart G. Ratner* and *Norton J. Come.*

Briefs of *amici curiae* supporting appellants in No. 10 were filed by *Arthur J. Goldberg, Frank Donner* and *Thomas E. Harris* for the Congress of Industrial Organizations; and *Osmond K. Fraenkel* and *Jerome Walsh* for the American Civil Liberties Union.

Briefs of *amici curiae* supporting appellants in No. 10 and petitioners in No. 13 were filed by *Robert W. Kenny, Robert J. Silberstein, Richard F. Watt* and *Edmund Hatfield* for the National Lawyers' Guild; and *Allan R. Rosenberg* for the United Electrical, Radio & Machine Workers (C. I. O.).

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

These cases present for decision the constitutionality of § 9 (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.[1] This section, commonly referred to as the non-Communist affidavit provision, reads as follows: "No investigation shall be made by the [National Labor Relations] Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or

[1] 61 Stat. 136, 146, 29 U. S. C. (Supp. III) § 141, § 159 (h), amending the National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*

constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

In No. 10, the constitutional issue was raised by a suit to restrain the Board from holding a representation election in a bargaining unit in which appellant union was the employee representative, without permitting its name to appear on the ballot, and, should the election be held, to restrain the Board from announcing the results or certifying the victor, until a hearing was granted to appellant. A hearing had been denied because of the noncompliance with § 9 (h). The complaint alleged that this requirement was unconstitutional. Appellee's motion to dismiss the complaint was granted by the statutory three-judge court, 79 F. Supp. 563 (1948), with one judge dissenting. Since the constitutional issues were properly raised and substantial, we noted probable jurisdiction.

No. 13 is the outcome of an unfair labor practice complaint filed with the Board by petitioner unions. The Board found that Inland Steel Company had violated the Labor Relations Act in refusing to bargain on the subject of pensions. 77 N. L. R. B. 1 (1948). But the Board postponed the effective date of its order compelling the company to bargain, pending the unions' compliance with § 9 (h). Both sides appealed: the company urged that the Act had been misinterpreted; the unions contended that § 9 (h) was unconstitutional and therefore an invalid condition of a Board order. When the court below upheld the Board on both counts, 170 F. 2d 247 (1948), with one judge dissenting as to § 9 (h), both sides filed petitions for certiorari. We denied the petition pertain-

ing to the pension issue, 336 U. S. 960 (1949), but granted the petition directed at the affidavit requirement, 335 U. S. 910 (1949), because of the manifest importance of the constitutional issues involved.

I.

The constitutional justification for the National Labor Relations Act was the power of Congress to protect interstate commerce by removing obstructions to the free flow of commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). That Act was designed to remove obstructions caused by strikes and other forms of industrial unrest, which Congress found were attributable to the inequality of bargaining power between unorganized employees and their employers. It did so by strengthening employee groups, by restraining certain employer practices, and by encouraging the processes of collective bargaining.

When the Labor Management Relations Act was passed twelve years later, it was the view of Congress that additional impediments to the free flow of commerce made amendment of the original Act desirable. It was stated in the findings and declaration of policy that:

> "Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." [2]

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[2] 29 U. S. C. (Supp. III) § 151.

One such obstruction, which it was the purpose of § 9 (h) of the Act to remove, was the so-called "political strike." Substantial amounts of evidence were presented to various committees of Congress, including the committees immediately concerned with labor legislation, that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. And other evidence supports the view that some union leaders who hold to a belief in violent overthrow of the Government for reasons other than loyalty to the Communist Party likewise regard strikes and other forms of direct action designed to serve ultimate revolutionary goals as the primary objectives of labor unions which they control.[3] At the committee hearings, the incident most fully developed was a strike at the Milwaukee plant of the Allis-Chalmers Manufacturing Company in 1941, when that plant was producing vital materials for the national defense program. A full hearing was given not only to company officials, but also to leaders of the international and local unions involved. Congress heard testimony that the strike had been called solely in obedience to Party orders for the purpose of starting the "snowballing of strikes" in defense plants.[4]

No useful purpose would be served by setting out at length the evidence before Congress relating to the prob-

[3] A detailed description of the aims and tactics of the Socialist Workers Party, for example, may be found in the transcript of record in *Dunne* v. *United States,* 320 U. S. 790 (1943), certiorari denied. We cite the record as evidence only and express no opinion whatever on the merits of the case. See record, pp. 267–271, 273–274, 330–332, 439, 475, 491–492, 495–496, 535, 606, 683–688, 693, 737, 804–805.

[4] See Hearings before House Committee on Education and Labor on Bills to Amend and Repeal the National Labor Relations Act, 80th Cong., 1st Sess. 3611–3615.

lem of political strikes, nor can we attempt to assess the validity of each item of evidence. It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action.

II.

The unions contend that the necessary effect of § 9 (h) is to make it impossible for persons who cannot sign the oath to be officers of labor unions. They urge that such a statute violates fundamental rights guaranteed by the First Amendment: the right of union officers to hold what political views they choose and to associate with what political groups they will, and the right of unions to choose their officers without interference from government.[5] The Board has argued, on the other hand, that § 9 (h) presents no First Amendment problem because its sole sanction is the withdrawal from noncomplying unions of the "privilege" of using its facilities.

Neither contention states the problem with complete accuracy. It cannot be denied that the practical effect of denial of access to the Board and the denial of a place on the ballot in representation proceedings is not merely to withhold benefits granted by the Government but to impose upon noncomplying unions a number of restrictions which would not exist if the Board had not been

[5] The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

established.[6] The statute does not, however, specifically forbid persons who do not sign the affidavit from holding positions of union leadership nor require their discharge from office. The fact is that § 9 (h) may well make it difficult for unions to remain effective if their officers do not sign the affidavits. How difficult depends upon the circumstances of the industry, the strength of the union and its organizational discipline. We are, therefore, neither free to treat § 9 (h) as if it merely withdraws a privilege gratuitously granted by the Government, nor able to consider it a licensing statute prohibiting those persons who do not sign the affidavit from holding union office. The practicalities of the situation place the proscriptions of § 9 (h) somewhere between those two extremes. The difficult question that emerges is whether, consistently with the First Amendment, Congress, by statute, may exert these pressures upon labor unions to deny positions of leadership to certain persons who are identified by particular beliefs and political affiliations.

III.

There can be no doubt that Congress may, under its constitutional power to regulate commerce among the several States, attempt to prevent political strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce. We think it is clear, in addition, that the remedy provided by § 9 (h) bears rea-

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[6] For example, a union whose officers do not file an affidavit in compliance with § 9 (h) may not enter into a union shop contract with an employer, as it was free to do before passage of the National Labor Relations Act. A noncomplying union is excluded from the ballot in representation proceedings. If another union is certified, the noncomplying union incurs the disabilities of §§ 8 (b) (4) (C) and 303 (a) (3), as it would not have done prior to 1935. Similarly, certain strikes and boycotts are prohibited to noncomplying unions by §§ 8 (b) (4) (B), 8 (b) (4) (C) and 8 (b) (4) (D) of the Act.

sonable relation to the evil which the statute was designed to reach. Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership as means by which to bring about strikes and other obstructions of commerce for purposes of political advantage, and that many persons who believe in overthrow of the Government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy.

The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant. *In re Summers,* 325 U. S. 561 (1945); *Hamilton* v. *Regents,* 293 U. S. 245 (1934). We have held that aliens may be barred from certain occupations because of a reasonable relation between that classification and the apprehended evil, *Clarke* v. *Deckebach,* 274 U. S. 392 (1927); *Pearl Assurance Co.* v. *Harrington,* 313 U. S. 549 (1941), even though the Constitution forbids arbitrary banning of aliens from the pursuit of lawful occupations. *Truax* v. *Raich,* 239 U. S. 33 (1915); *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948). Even distinctions based solely on ancestry, which we declared "are by their very nature odious to a free people," have been upheld under the unusual circumstances of wartime. *Hirabayashi* v. *United States,* 320 U. S. 81 (1943).[7] If accidents of birth and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations.

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[7] See also *Luria* v. *United States,* 231 U. S. 9 (1913); *Mackenzie* v. *Hare,* 239 U. S. 299 (1915); *Lapides* v. *Clark,* 85 U. S. App. D. C. 101, 176 F. 2d 619 (1949).

This principle may be illustrated by reference to statutes denying positions of public importance to groups of persons identified by their business affiliations. One federal statute,[8] for example, provides that no partner or employee of a firm primarily engaged in underwriting securities may be a director of a national bank. This Court noted that the statute is directed "to the probability or likelihood, based on the experience of the 1920's, that a bank director interested in the underwriting business may use his influence in the bank to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take." *Board of Governors* v. *Agnew,* 329 U. S. 441, 447 (1947). It was designed "to remove tempting opportunities from the management and personnel of member banks." *Id.* at p. 449. There was no showing, nor was one required, that all employees of underwriting firms would engage in such conduct. Because of their business connections, carrying as they do certain loyalties, interests and disciplines, those persons were thought to pose a continuing threat of participation in the harmful activities described above. Political affiliations of the kind here involved, no less than business affiliations, provide rational ground for the legislative judgment that those persons proscribed by § 9 (h) would be subject to "tempting opportunities" to commit acts deemed harmful to the national economy. In this respect, § 9 (h) is not unlike a host of other statutes which prohibit specified groups of persons from holding positions of power and public interest because, in the legislative judgment, they threaten to abuse the trust that is a necessary concomitant of the power of office.

If no more were involved than possible loss of position, the foregoing would dispose of the case. But the more

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[8] Sections 30 and 32 of the Banking Act of 1933, 48 Stat. 162, 193, 194, as amended, 49 Stat. 684, 709, 12 U. S. C. §§ 77, 78.

difficult problem here arises because, in drawing lines on the basis of beliefs and political affiliations, though it may be granted that the proscriptions of the statute bear a reasonable relation to the apprehended evil, Congress has undeniably discouraged the lawful exercise of political freedoms as well. Stated otherwise, the problem is this: Communists, we may assume, carry on legitimate political activities. Beliefs are inviolate. *Cantwell* v. *Connecticut,* 310 U. S. 296, 303 (1940). Congress might reasonably find, however, that Communists, unlike members of other political parties, and persons who believe in overthrow of the Government by force, unlike persons of other beliefs, represent a continuing danger of disruptive political strikes when they hold positions of union leadership. By exerting pressures on unions to deny office to Communists and others identified therein, § 9 (h) undoubtedly lessens the threat to interstate commerce, but it has the further necessary effect of discouraging the exercise of political rights protected by the First Amendment. Men who hold union offices often have little choice but to renounce Communism or give up their offices. Unions which wish to do so are discouraged from electing Communists to office. To the grave and difficult problem thus presented we must now turn our attention.

IV.

The unions contend that once it is determined that this is a free speech case, the "clear and present danger" test must apply. See *Schenck* v. *United States,* 249 U. S. 47 (1919). But they disagree as to how it should be applied. Appellant in No. 10 would require that joining the Communist Party or the expression of belief in overthrow of the Government by force be shown to be a clear and present danger of some substantive evil, since those are the doctrines affected by the statute. Peti-

tioner in No. 13, on the other hand, would require a showing that political strikes, the substantive evil involved, are a clear and present danger to the security of the Nation or threaten widespread industrial unrest.

This confusion suggests that the attempt to apply the term, "clear and present danger," as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application, mistakes the form in which an idea was cast for the substance of the idea. The provisions of the Constitution, said Mr. Justice Holmes, "are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States,* 233 U. S. 604, 610 (1914). Still less should this Court's interpretations of the Constitution be reduced to the status of mathematical formulas. It is the considerations that gave birth to the phrase, "clear and present danger," not the phrase itself, that are vital in our decision of questions involving liberties protected by the First Amendment.

Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts. Freedom of speech thus does not comprehend the right to speak on any subject at any time. The important question that came to this Court immediately after the First World War was not whether, but how far, the First Amendment permits the suppression of speech which advocates conduct inimical

to the public welfare.[9] Some thought speech having a reasonable tendency to lead to such conduct might be punished. Justices Holmes and Brandeis took a different view. They thought that the greater danger to a democracy lies in the suppression of public discussion; that ideas and doctrines thought harmful or dangerous are best fought with words. Only, therefore, when force is very likely to follow an utterance before there is a chance for counter-argument to have effect may that utterance be punished or prevented.[10] Thus, "the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State [or Congress] constitutionally may seek to prevent . . . ." Mr. Justice Brandeis, concurring in *Whitney* v. *California,* 274 U. S. 357, 373. By this means they sought to convey the philosophy that, under the First Amendment, the public has a right to every man's views and every man the right to speak them. Government may cut him off only when his views are no longer merely views but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself.

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[9] See *Schenck* v. *United States,* 249 U. S. 47 (1919); *Frohwerk* v. *United States,* 249 U. S. 204 (1919); *Debs* v. *United States,* 249 U. S. 211 (1919); *Abrams* v. *United States,* 250 U. S. 616 (1919); *Schaefer* v. *United States,* 251 U. S. 466 (1920); *Pierce* v. *United States,* 252 U. S. 239 (1920); *Gitlow* v. *New York,* 268 U. S. 652 (1925).

[10] ". . . no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Mr. Justice Brandeis, concurring in *Whitney* v. *California,* 274 U. S. 357, 377 (1927).

But the question with which we are here faced is not the same one that Justices Holmes and Brandeis found convenient to consider in terms of clear and present danger. Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all. Section 9 (h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs. The Board does not contend that political strikes, the substantive evil at which § 9 (h) is aimed, are the present or impending products of advocacy of the doctrines of Communism or the expression of belief in overthrow of the Government by force. On the contrary, it points out that such strikes are called by persons who, so Congress has found, have the will and power to do so *without* advocacy or persuasion that seeks acceptance in the competition of the market.[11] Speech may be fought with speech. Falsehoods and fallacies must be exposed, not suppressed, unless there is not sufficient time to avert the evil consequences of noxious doctrine by argument and education. That is the command of the First Amendment. But force may and must be met with force. Section 9 (h) is designed to protect the public not against what Communists and others identified therein advocate or believe, but against what Congress has concluded they have done and are likely to do again.

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[11] See Mr. Justice Holmes, dissenting in *Abrams* v. *United States*, 250 U. S. 616, 630 (1919).

The contention of petitioner in No. 13 that this Court must find that political strikes create a clear and present danger to the security of the Nation or of widespread industrial strife in order to sustain § 9 (h) similarly misconceives the purpose that phrase was intended to serve. In that view, not the relative certainty that evil conduct will result from speech in the immediate future, but the extent and gravity of the substantive evil must be measured by the "test" laid down in the *Schenck* case. But there the Court said that: "The question in every case is whether the *words* used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States, supra* at 52. (Emphasis supplied.)

So far as the *Schenck* case itself is concerned, imminent danger of any substantive evil that Congress may prevent justifies the restriction of speech. Since that time this Court has decided that however great the likelihood that a substantive evil will result, restrictions on speech and press cannot be sustained unless the evil itself is "substantial" and "relatively serious," Brandeis, J., concurring in *Whitney* v. *California, supra* at 374, 377, or sometimes "extremely serious," *Bridges* v. *California,* 314 U. S. 252, 263 (1941). And it follows therefrom that even harmful conduct cannot justify restrictions upon speech unless substantial interests of society are at stake. But in suggesting that the substantive evil must be serious and substantial, it was never the intention of this Court to lay down an absolutist test measured in terms of danger to the Nation. When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of sub-

stantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Porterville,* 338 U. S. 805 (1949). And recent cases in this Court involving contempt by publication likewise have no meaning if imminent danger of national peril is the criterion.[12]

On the contrary, however, the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. We have noted that the blaring sound truck invades the privacy of the home and may drown out others who wish to be heard. *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). The unauthorized parade through city streets by a religious or political group disrupts traffic and may prevent the discharge of the most essential obligations of local government. *Cox* v. *New Hampshire,* 312 U. S. 569, 574 (1941). The exercise of particular First Amendment rights may fly in the face of the public interest in the health of children, *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), or of the whole community, *Jacobson* v. *Massachusetts,* 197 U. S. 11 (1905), and it may be offensive to the moral standards of the community, *Reynolds* v. *United States,* 98 U. S. 145 (1878); *Davis* v. *Beason,* 133 U. S. 333 (1890). And Government's obligation to provide an efficient public service, *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), and its interest in the character of members of the bar, *In re Summers,* 325 U. S. 561 (1945), sometimes admit of limitations upon rights set out in the First Amendment. And see *Giboney* v. *Empire Storage Co.,*

[12] *Bridges* v. *California,* 314 U. S. 252 (1941); *Pennekamp* v. *Florida,* 328 U. S. 331 (1946); *Craig* v. *Harney,* 331 U. S. 367 (1947).

336 U. S. 490, 499–501 (1949). We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox* v. *New Hampshire, supra* at 574.

When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of "conduct" has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas. We have been reminded that "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control." [13]

On the other hand, legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct, are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights. *Reynolds* v. *United States, supra; Prince* v. *Massachusetts, supra; Cox* v.

[13] Mr. Justice Jackson, concurring in *Thomas* v. *Collins*, 323 U. S. 516, 547 (1945).

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New Hampshire, supra; Giboney v. *Empire Storage Co., supra.* In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9 (h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the "delicate and difficult task . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Schneider* v. *State,* 308 U. S. 147, 161 (1939).

V.

The "reasons advanced in support of the regulation" are of considerable weight, as even the opponents of § 9 (h) agreed. They are far from being "[m]ere legislative preferences or beliefs respecting matters of public convenience [which] may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." [14] It should be emphasized that Congress, not the courts, is primarily charged with determination of the need for regulation of activities affecting interstate commerce. This Court must, if such regulation unduly infringes personal freedoms, declare the statute invalid under the First Amendment's command that the opportunities for free public discussion be maintained. But insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the stat-

[14] *Schneider* v. *State,* 308 U. S. 147, 161 (1939).

ute for that of Congress. Cf. *United Public Workers* v. *Mitchell, supra* at 95, 102. In *Bridges* v. *California, supra,* we said that even restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need, come to this Court "encased in the armor wrought by prior legislative deliberation." 314 U. S. at 261. Compare *Gitlow* v. *New York,* 268 U. S. 652 (1925). The deference due legislative determination of the need for restriction upon particular forms of conduct has found repeated expression in this Court's opinions.

When compared with ordinances and regulations dealing with littering of the streets or disturbance of householders by itinerant preachers, the relative significance and complexity of the problem of political strikes and how to deal with their leaders becomes at once apparent. It must be remembered that § 9 (h) is not an isolated statute dealing with a subject divorced from the problems of labor peace generally. It is a part of some very complex machinery set up by the Federal Government for the purpose of encouraging the peaceful settlement of labor disputes. Under the statutory scheme, unions which become collective bargaining representatives for groups of employees often represent not only members of the union but nonunion workers or members of other unions as well. Because of the necessity to have strong unions to bargain on equal terms with strong employers, individual employees are required by law to sacrifice rights which, in some cases, are valuable to them. See *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332 (1944). The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union. But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.

See *Graham* v. *Brotherhood of Locomotive Firemen,* 338 U. S. 232 (1949); *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 210 (1944); *Wallace Corp.* v. *Labor Board,* 323 U. S. 248, 255 (1944); *Railway Mail Association* v. *Corsi,* 326 U. S. 88, 94 (1945).

We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such. But it is plain that when Congress clothes the bargaining representative "with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents," [15] the public interest in the good faith exercise of that power is very great.

What of the effects of § 9 (h) upon the rights of speech and assembly of those proscribed by its terms? The statute does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief. But as we have noted, the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect "discouragements" undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.

But we have here no statute which is either frankly aimed at the suppression of dangerous ideas [16] nor one

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[15] *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, 202 (1944).

[16] Cf. cases cited in note 9, *supra,* and *Whitney* v. *California,* 274 U. S. 357 (1927); *Fiske* v. *Kansas,* 274 U. S. 380 (1927); *Stromberg* v. *California,* 283 U. S. 359 (1931); *Near* v. *Minnesota,* 283 U. S. 697 (1931); *De Jonge* v. *Oregon,* 299 U. S. 353 (1937); *Herndon* v. *Lowry,* 301 U. S. 242 (1937).

which, although ostensibly aimed at the regulation of conduct, may actually "be made the instrument of arbitrary suppression of free expression of views." *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496, 516 (1939).[17] There are here involved none of the elements of censorship or prohibition of the dissemination of information that were present in the cases mainly relied upon by those attacking the statute.[18] The "discouragements" of § 9 (h) proceed, not against the groups or beliefs identified therein, but only against the combination of

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[17] Cf. *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936); *Thomas* v. *Collins,* 323 U. S. 516 (1945).

[18] In *Cox* v. *New Hampshire,* 312 U. S. 569 (1941), Mr. Chief Justice Hughes, speaking for a unanimous Court, stated the considerations thought controlling in a number of these cases: "In *Lovell* v. *Griffin,* [303 U. S. 444], the ordinance prohibited the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager, thus striking at the very foundation of the freedom of the press by subjecting it to license and censorship. In *Hague* v. *Committee for Industrial Organization,* [307 U. S. 496], the ordinance dealt with the exercise of the right of assembly for the purpose of communicating views; it did not make comfort or convenience in the use of streets the standard of official action but enabled the local official absolutely to refuse a permit on his mere opinion that such refusal would prevent 'riots, disturbances or disorderly assemblage.' The ordinance thus created, as the record disclosed, an instrument of arbitrary suppression of opinions on public questions. The court said that 'uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.' In *Schneider* v. *State,* [308 U. S. 147] (p. 163) the ordinance was directed at canvassing and banned unlicensed communication of any views, or the advocacy of any cause, from door to door, subject only to the power of a police officer to determine as a censor what literature might be distributed and who might distribute it. In *Cantwell* v. *Connecticut,* [310 U. S. 296] (p. 305) the statute dealt with the solicitation of funds for religious causes and authorized an official to determine whether the cause was a religious one and to refuse a permit if he determined it was not, thus establishing a censorship of religion." 312 U. S. at 577–578.

those affiliations or beliefs with occupancy of a position of great power over the economy of the country. Congress has concluded that substantial harm, in the form of direct, positive action, may be expected from that combination. In this legislation, Congress did not restrain the activities of the Communist Party as a political organization; nor did it attempt to stifle beliefs. Compare *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943).[19] Section 9 (h) touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. And it leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress has concluded are being abused to the injury of the public by members of the described groups.

We have previously had occasion to consider other statutes and regulations in which the interests involved were, in large measure, like those now being considered. In *United Public Workers* v. *Mitchell, supra,* we upheld

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[19] In the *Barnette* case, the Court was careful to point out that the sole interest of the State was in securing uniformity of belief by compelling utterance of a prescribed pledge, and that refusal to comply with the State order resulted in punishment for both parent and child: "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude." 319 U. S. at 630–631.

a statute which provided that employees of the Federal Government could not participate in partisan political activities, concededly a First Amendment right, if they would retain their positions. The decision was not put upon the ground that government employment is a privilege to be conferred or withheld at will. For it was recognized that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." 330 U. S. at 100. But the rational connection between the prohibitions of the statute and its objects, the limited scope of the abridgment of First Amendment rights, and the large public interest in the efficiency of government service, which Congress had found necessitated the statute, led us to the conclusion that the statute may stand consistently with the First Amendment.

Similarly, in *In re Summers, supra,* we upheld the refusal of a state supreme court to admit to membership of its bar an otherwise qualified person on the sole ground that he had conscientious scruples against war and would not use force to prevent wrong under any circumstances. Since he could not, so the justices of the state court found, swear in good faith to uphold the state constitution, which requires service in the militia in time of war, we held that refusal to permit him to practice law did not violate the First Amendment, as its commands are incorporated in the Due Process Clause of the Fourteenth Amendment. Again, the relation between the obligations of membership in the bar and service required by the state in time of war, the limited effect of the state's holding upon speech and assembly, and the strong interest which every state court has in the persons who become officers of the court were thought sufficient to justify the state action. See also *Hamilton* v. *Regents, supra.*

It is contended that the principle that statutes touching First Amendment freedoms must be narrowly drawn dictates that a statute aimed at political strikes should make the calling of such strikes unlawful but should not attempt to bring about the removal of union officers, with its attendant effect upon First Amendment rights. We think, however, that the legislative judgment that interstate commerce must be protected from a continuing threat of such strikes is a permissible one in this case. The fact that the injury to interstate commerce would be an accomplished fact before any sanctions could be applied, the possibility that a large number of such strikes might be called at a time of external or internal crisis, and the practical difficulties which would be encountered in detecting illegal activities of this kind are factors which are persuasive that Congress should not be powerless to remove the threat, not limited to punishing the act. We recently said that "nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality." *North American Co.* v. *Securities & Exchange Commission,* 327 U. S. 686, 711 (1946). While this statement may be subject to some qualification, it indicates the wide scope of congressional power to keep from the channels of commerce that which would hinder and obstruct such commerce.

VI.

Previous discussion has considered the constitutional questions raised by § 9 (h) as they apply alike to members of the Communist Party and affiliated organizations and to persons who believe in overthrow of the Government by force. The breadth of the provision concerning belief in overthrow of the Government by force would raise additional questions, however, if it were read

very literally to include all persons who might, under any conceivable circumstances, subscribe to that belief.

But we see no reason to construe the statute so broadly. It is within the power and is the duty of this Court to construe a statute so as to avoid the danger of unconstitutionality if it may be done in consonance with the legislative purpose. *United States* v. *Congress of Industrial Organizations,* 335 U. S. 106, 120–121 (1948); *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407–408 (1909). In enacting § 9 (h), Congress had as its objective the protection of interstate commerce from direct interference, not any intent to disturb or proscribe beliefs as such. Its manifest purpose was to bring within the terms of the statute only those persons whose beliefs strongly indicate a will to engage in political strikes and other forms of direct action when, as officers, they direct union activities. The congressional purpose is therefore served if we construe the clause, "that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods," to apply to persons and organizations who believe in violent overthrow of the Government as it presently exists under the Constitution as an objective, not merely a prophecy. Congress might well find that such persons—those who believe that the present form of the Government of the United States should be changed by force or other illegal methods—would carry that objective into their conduct of union affairs by calling political strikes designed to weaken and divide the American people, whether they consider actual overthrow of the Government to be near or distant. It is to those persons that § 9 (h) is intended to apply, and only to them. We hold, therefore, that the belief identified in § 9 (h) is a belief in the objective of overthrow by force or by any illegal or unconstitutional

methods of the Government of the United States as it now exists under the Constitution and laws thereof.

As thus construed, we think that the "belief" provision of the oath presents no different problem from that present in that part of the section having to do with membership in the Communist Party. Of course we agree that one may not be imprisoned or executed because he holds particular beliefs. But to attack the straw man of "thought control" is to ignore the fact that the sole effect of the statute upon one who believes in overthrow of the Government by force and violence—and does not deny his belief—is that he may be forced to relinquish his position as a union leader. That fact was crucial in our discussion of the statute as it relates to membership in the Communist Party. To quote, with pertinent substitutions, an apt statement of that principle, *post,* p. 434: "The Act does not suppress or outlaw the [belief in overthrow of the Government], nor prohibit it or [those who hold that belief] from engaging in any aboveboard activity . . . . No individual is forbidden to be or to become a philosophical [believer in overthrow of Government] or a full-fledged member of [a group which holds that belief]. No one is penalized for writing or speaking in favor of [such a belief] or its philosophy. Also, the Act does not require or forbid anything whatever to any person merely because he is [a believer in overthrow of the Government by force]. It applies only to one who becomes an officer of a labor union."

If the principle that one may under no circumstances be required to state his beliefs on any subject nor suffer the loss of any right or privilege because of his beliefs be a valid one, its application in other possible situations becomes relevant. Suppose, for example, that a federal statute provides that no person may become a member of the Secret Service force assigned to protect the President unless he swears that he does not believe in assassination

of the President. Is this beyond the power of Congress, whatever the need revealed by its investigations? An affirmative answer hardly commends itself to reason unless, indeed, the Bill of Rights has been converted into a "suicide pact." *Terminiello* v. *Chicago,* 337 U. S. 1, 37 (1949) (dissenting opinion). Yet the example chosen is far-fetched only because of the manifest absurdity of reliance upon an oath in such a situation. One can have no doubt that the screening process in the selection of persons to occupy such positions probes far deeper than mere oath-taking can possibly do.

To hold that such an oath is permissible, on the other hand, is to admit that the circumstances under which one is asked to state his belief and the consequences which flow from his refusal to do so or his disclosure of a particular belief make a difference. The reason for the difference has been pointed out at some length above. First, the loss of a particular position is not the loss of life or liberty. We have noted that the distinction is one of degree, and it is for this reason that the effect of the statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts in determining whether the balance struck by Congress comports with the dictates of the Constitution. But it is inaccurate to speak of § 9 (h) as "punishing" or "forbidding" the holding of beliefs, any more than it punishes or forbids membership in the Communist Party.

Second, the public interest at stake in ascertaining one's beliefs cannot automatically be assigned at zero without consideration of the circumstances of the inquiry. If it is admitted that beliefs are springs to action, it becomes highly relevant whether the person who is asked whether he believes in overthrow of the Government by force is a general with five hundred thousand men at his command or a village constable. To argue that because the latter

may not be asked his beliefs the former must *necessarily* be exempt is to make a fetish of beliefs. The answer to the implication that if this statute is upheld "then the power of government over beliefs is as unlimited as its power over conduct and the way is open to force disclosure of attitudes on all manner of social, economic, moral and political issues," *post*, p. 438, is that that result does not follow "while this Court sits." [20] The circumstances giving rise to the inquiry, then, are likewise factors to be weighed by the courts, giving due weight, of course, to the congressional judgment concerning the need. In short, the problem of balancing the conflicting individual and national interests involved is no different from the problem presented by proscriptions based upon political affiliations.

Insofar as a distinction between beliefs and political affiliations is based upon absence of any "overt act" in the former case, it is relevant, if at all, in connection with problems of proof. In proving that one swore falsely

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[20] *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223 (1928) (dissenting opinion). The words of Mr. Justice Holmes, while written concerning a very different problem, are well worth rereading in this connection:

"It seems to me that the State Court was right. I should say plainly right, but for the effect of eertain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. *Hatch* v. *Reardon*, 204 U. S. 152, 162."

that he is not a Communist, the act of joining the Party is crucial. Proof that one lied in swearing that he does not believe in overthrow of the Government by force, on the other hand, must consist in proof of his mental state. To that extent they differ.

To state the difference, however, is but to recognize that while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot "ascertain the thought that has had no outward manifestation." But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred. See 2 Wigmore, Evidence (3d ed.) §§ 244, 256 *et seq.* False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much "overt acts" as the act of joining the Communist Party, there can be no successful prosecution for false swearing.[21]

Considering the circumstances surrounding the problem—the deference due the congressional judgment concerning the need for regulation of conduct affecting interstate commerce and the effect of the statute upon rights of speech, assembly and belief—we conclude that § 9 (h)

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[21] While it is true that state of mind is ordinarily relevant only when it is incidental to, and determines the quality of, some overt act (but cf. *Hamilton* v. *Regents,* 293 U. S. 245 (1934); *In re Summers,* 325 U. S. 561 (1945)), the fact must not be overlooked that mental state in such cases is a distinct issue, 2 Wigmore, Evidence (3d ed.) §§ 244, 266, of which the "overt act" may or may not be any proof. For example, the physical facts surrounding a death by shooting may be as consistent with a finding of accident as of murder. Wilfullness, malice and premeditation must therefore be proved by evidence wholly apart from the act of shooting.

of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, does not unduly infringe freedoms protected by the First Amendment. Those who, so Congress has found, would subvert the public interest cannot escape all regulation because, at the same time, they carry on legitimate political activities. Cf. *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942). To encourage unions to displace them from positions of great power over the national economy, while at the same time leaving free the outlets by which they may pursue legitimate political activities of persuasion and advocacy, does not seem to us to contravene the purposes of the First Amendment. That Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom. It does not require that he be permitted to be the keeper of the arsenal.

VII.

There remain two contentions which merit discussion. One is that § 9 (h) is unconstitutionally vague. The other is that it violates the mandate of Art. I, § 9 of the Constitution that "No Bill of Attainder or ex post facto Law shall be passed."

The argument as to vagueness stresses the breadth of such terms as "affiliated," "supports" and "illegal or unconstitutional methods." There is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question. The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important.

The only criminal punishment specified is the application of § 35 (A) of the Criminal Code, 18 U. S. C. § 1001, which covers only those false statements made

"knowingly and willfully." The question in any criminal prosecution involving a non-Communist affidavit must therefore be whether the affiant acted in good faith or knowingly lied concerning his affiliations, beliefs, support of organizations, etc. And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable. As this Court pointed out in *United States* v. *Ragen,* 314 U. S. 513, 524 (1942), "A mind intent upon willful evasion is inconsistent with surprised innocence." Cf. *Omaechevarria* v. *Idaho,* 246 U. S. 343 (1918); *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497 (1925); *Screws* v. *United States,* 325 U. S. 91 (1945). Without considering, therefore, whether in other circumstances the words used in § 9 (h) would render a statute unconstitutionally vague and indefinite, we think that the fact that under § 35 (A) of the Criminal Code no honest, untainted interpretation of those words is punishable removes the possibility of constitutional infirmity.

The unions' argument as to bill of attainder cites the familiar cases, *United States* v. *Lovett,* 328 U. S. 303 (1946); *Ex parte Garland,* 4 Wall. 333 (1867); *Cummings* v. *Missouri,* 4 Wall. 277 (1867). Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what

the future conduct is likely to be; but that does not alter the conclusion that § 9 (h) is intended to prevent future action rather than to punish past action.

This distinction is emphasized by the fact that members of those groups identified in § 9 (h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in § 9 (h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See *United States* v. *Lovett, supra,* at p. 314; *Cummings* v. *Missouri, supra,* at p. 327. Here the intention is to forestall future dangerous acts; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder.

In their argument on this point, the unions seek some advantage from references to English history pertinent to a religious test oath. That experience is written into our Constitution in the following provision of Article VI: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." It is obvious that not all oaths were abolished; the mere fact that § 9 (h) is in oath form hardly rises to the stature of a constitutional objection. All that was forbidden was a "religious Test." We do not think that the oath

here involved can rightly be taken as falling within that category.

Clearly the Constitution permits the requirement of oaths by officeholders to uphold the Constitution itself. The obvious implication is that those unwilling to take such an oath are to be barred from public office. For the President, a specific oath was set forth in the Constitution itself. Art. II, § 1. And Congress has detailed an oath for other federal officers.[22] Obviously, the Framers of the Constitution thought that the exaction of an affirmation of minimal loyalty to the Government was worth the price of whatever deprivation of individual freedom of conscience was involved. All that we need hold here is that the casting of § 9 (h) into the mold of an oath does not invalidate it, if it is otherwise constitutional.

We conclude that § 9 (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, as herein construed, is compatible with the Federal Constitution and may stand. The judgments of the courts below are therefore

Affirmed.

MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK and MR. JUSTICE MINTON took no part in the consideration or decision of these cases.

MR. JUSTICE FRANKFURTER, concurring in the Court's opinion except as to Part VII.

"Scarcely any political question arises in the United States," observed the perceptive de Tocqueville as early as 1835, "that is not resolved, sooner or later, into a judicial question." 1 Democracy in America 280 (Bradley ed. 1948). And so it was to be expected that the conflict of political ideas now dividing the world more pervasively than any since this nation was founded would give rise to controversies for adjudication by this Court.

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[22] 23 Stat. 22, 5 U. S. C. § 16.

"The judicial Power" with which alone this Court is invested comes into operation only as to issues that the long tradition of our history has made appropriate for disposition by judges. When such questions are properly here they are to be disposed of within those strict confines of legal reasoning which laymen too often deem invidiously technical. This restriction to justiciable issues to be disposed of in the unrhetorical manner of opinion-writing reflects respect by the judiciary for its very limited, however great, function in the proper distribution of authority in our political scheme so as to avoid autocratic rule. No doubt issues like those now before us cannot be completely severed from the political and emotional context out of which they emerge. For that very reason adjudication touching such matters should not go one whit beyond the immediate issues requiring decision, and what is said in support of the adjudication should insulate the Court as far as is rationally possible from the political conflict beneath the legal issues.

The central problem presented by the enactment now challenged is the power of Congress, as part of its comprehensive scheme for industrial peace, to keep Communists out of controlling positions in labor unions as a condition to utilizing the opportunities afforded by the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.[1] Wrapped up

[1] Section 9 (h) requires each officer of a union seeking to invoke the machinery of the Labor Management Relations Act to submit an affidavit "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." 61 Stat. 146, 29 U. S. C. (Supp. III) § 159 (h). The provisions of what is now 18 U. S. C. § 1001, formerly § 35 (A) of the Criminal Code, are made applicable in respect to such affidavits.

in this problem are two great concerns of our democratic society—the right of association for economic and social betterment and the right of association for political purposes. It is too late in the day to deny to Congress the power to promote industrial peace in all the far-flung range of interstate commerce. To that end, Congress may take appropriate measures to protect interstate commerce against disruptive conduct not fairly related to industrial betterment within our democratic framework. It is one thing to forbid heretical political thought merely as heretical thought. It is quite a different thing for Congress to restrict attempts to bring about another scheme of society, not through appeal to reason and the use of the ballot as democracy has been pursued throughout our history, but through an associated effort to disrupt industry.

Thus stated, it would make undue inroads upon the policy-making power of Congress to deny it the right to protect the industrial peace of the country by excluding from leadership in trade unions which seek to avail themselves of the machinery of the Labor Management Relations Act those who are united for action against our democratic process. This is so not because Congress in affording a facility can subject it to any condition it pleases. It cannot. Congress may withhold all sorts of facilities for a better life but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities. Congress surely can provide for certain clearly relevant qualifications of responsibility on the part of leaders of trade unions invoking the machinery of the Labor Management Relations Act. The essential question now is whether Congress may determine that membership of union officers in the Communist Party creates such an obvious hazard to the peace-promoting purposes of the Act that access to the machin-

ery of the Act may be denied unions which prefer their freedom to have officers who are Communists to their opportunities under the Act.

When we are dealing with conflicting freedoms, as we are on the issues before us, we are dealing with large concepts that too readily lend themselves to explosive rhetoric. We are also dealing with matters as to which different nuances in phrasing the same conclusion lead to different emphasis and thereby eventually may lead to different conclusions in slightly different situations. From my point of view these are issues as to which it would be desirable for the members of the Court to write full-length individual opinions. The Court's business in our time being what it is precludes this. It must suffice for me to say that the judgment of Congress that trade unions which are guided by officers who are committed by ties of membership to the Communist Party must forego the advantages of the Labor Management Relations Act is reasonably related to the accomplishment of the purposes which Congress constitutionally had a right to pursue. To deny that that is a judgment which Congress may, as a matter of experience, enforce even though it involves the indicated restrictions upon freedom would be to make naïveté a requirement in judges. Since the Court's opinion, in the main, expresses the point of view which I have very inadequately sketched, I join it except as qualified in what follows.

Congress was concerned with what it justifiably deemed to be the disorganizing purposes of Communists who hold positions of official power in labor unions, or, at the least, what it might well deem their lack of disinterested devotion to the basic tenets of the American trade union movement because of a higher loyalty to a potentially conflicting cause. But Congress did not choose merely to limit the freedom of labor unions which seek the advantages of the Labor Management Relations Act to

be led by officers who are not willing to disavow membership in the Communist Party. The scope of its legislation was much more extensive.

Legislation, in order to effectuate its purposes, may deal with radiations beyond the immediate incidence of a mischief. If a particular mischief is within the scope of congressional power, wide discretion must be allowed to Congress for dealing with it effectively. It is not the business of this Court to restrict Congress too narrowly in defining the extent or the nature of remedies. How to curb an evil, what remedies will be effective; the reach of a particular evil and therefore the appropriate scope of a remedy against it—all these are in the main matters of legislative policy not open to judicial condemnation. There are, of course, some specific restrictions in devising remedies. No matter what its notions of policy may be, the Eighth Amendment, for example, bars Congress from inflicting "cruel and unusual punishments." I do not suppose it is even arguable that Congress could ask for a disclosure of how union officers cast their ballots at the last presidential election even though the secret ballot is a relatively recent institution. See Wigmore, The Australian Ballot System 3, 15, 22 (1889). So also Congress must keep within the contours of the "due process" requirement of the Fifth Amendment, vague as they are. In order to curb a mischief Congress cannot be so indefinite in its requirements that effort to meet them raises hazards unfair to those who seek obedience or involves surrender of freedoms which exceeds what may fairly be exacted. These restrictions on the broad scope of legislative discretion are merely the law's application of the homely saws that one should not throw out the baby with the bath or burn the house in order to roast the pig.

In my view Congress has cast its net too indiscriminately in some of the provisions of § 9 (h). To ask

avowal that one "does not believe in, and is not a member of or supports any organization that believes in . . . the overthrow of the United States Government . . . by any illegal or unconstitutional methods" is to ask assurances from men regarding matters that open the door too wide to mere speculation or uncertainty. It is asking more than rightfully may be asked of ordinary men to take oath that a method is not "unconstitutional" or "illegal" when constitutionality or legality is frequently determined by this Court by the chance of a single vote.[2] It does not meet the difficulty to suggest that the hazard of a prosecution for perjury is not great since the convictions for perjury must be founded on willful falsity. To suggest that a judge might not be justified in allowing a case to go to a jury, or that a jury would not be justified in convicting, or that, on the possible happening of these events, an appellate court would be compelled to reverse, or, finally, that resort could be had to this Court for review on a petition for certiorari, affords safeguards too tenuous to neutralize the danger. See *Musser* v. *Utah*, 333 U. S. 95. The hazards that were found to be fatal to the legislation under review in *Winters* v. *New York*, 333 U. S. 507, appear trivial by comparison with what is here involved.

It is not merely the hazard of prosecution for perjury that is dependent on a correct determination as to the implications of a man's belief or the belief of others with whom he may be associated in an organization concerned with political and social issues. It should not be assumed that oaths will be lightly taken; fastidiously scrupulous regard for them should be encouraged. Therefore, it becomes most relevant whether an oath which Congress asks men to take may or may not be thought to touch

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[2] As to the dubious scope of the term "affiliated" in the statute, see *Bridges* v. *Wixon*, 326 U. S. 135.

matters that may not be subjected to compulsory avowal of belief or disbelief. In the uncertainty of the reach of § 9 (h), one may withhold an oath because of conscientious scruples that it covers beliefs whose disclosure Congress could not in terms exact. If a man has scruples about taking an oath because of uncertainty as to whether it encompasses some beliefs that are inviolate, the surrender of abstention is invited by the ambiguity of the congressional exaction. As MR. JUSTICE JACKSON'S opinion indicates, probing into men's thoughts trenches on those aspects of individual freedom which we rightly regard as the most cherished aspects of Western civilization. The cardinal article of faith of our civilization is the inviolate character of the individual. A man can be regarded as an individual and not as a function of the state only if he is protected to the largest possible extent in his thoughts and in his beliefs as the citadel of his person. Entry into that citadel can be justified, if at all, only if strictly confined so that the belief that a man is asked to reveal is so defined as to leave no fair room for doubt that he is not asked to disclose what he has a right to withhold.

No one could believe more strongly than I do that every rational indulgence should be made in favor of the constitutionality of an enactment by Congress. I deem it my duty to go to the farthest possible limits in so construing legislation as to avoid a finding that Congress has exceeded the limits of its powers. See, *e. g.*, *United States* v. *Lovett,* 328 U. S. 303, 318, 329; *Shapiro* v. *United States,* 335 U. S. 1, 36; *United States* v. *C. I. O.,* 335 U. S. 106, 124, 129.

If I possibly could, to avoid questions of unconstitutionality I would construe the requirements of § 9 (h) to be restricted to disavowal of actual membership in the Communist Party, or in an organization that is in fact a controlled cover for that Party or of active belief,

as a matter of present policy, in the overthrow of the Government of the United States by force. But what Congress has written does not permit such a gloss nor deletion of what it has written. See *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500. I cannot deem it within the rightful authority of Congress to probe into opinions that involve only an argumentative demonstration of some coincidental parallelism of belief with some of the beliefs of those who direct the policy of the Communist Party, though without any allegiance to it. To require oaths as to matters that open up such possibilities invades the inner life of men whose compassionate thought or doctrinaire hopes may be as far removed from any dangerous kinship with the Communist creed as were those of the founders of the present orthodox political parties in this country.

The offensive provisions of § 9 (h) leave unaffected, however, the valid portions of the section. In § 16, Congress has made express provision for such severance. Since the judgments below were based in part on what I deem unconstitutional requirements, I cannot affirm but would remand to give opportunity to obey merely the valid portions of § 9 (h).

MR. JUSTICE JACKSON, concurring and dissenting, each in part.

If the statute before us required labor union officers to forswear membership in the Republican Party, the Democratic Party or the Socialist Party, I suppose all agree that it would be unconstitutional. But why, if it is valid as to the Communist Party?

The answer, for me, is in the decisive differences between the Communist Party and every other party of any importance in the long experience of the United States with party government. In order that today's decision may not be useful as a precedent for suppression of any

political opposition compatible with our free institutions, I limit concurrence to grounds and distinctions explicitly set forth herein, without which I should regard this Act as unconstitutional.

To state controlling criteria definitively is both important and difficult, because those Communist Party activities visible to the public closely resemble those of any other party. Parties, whether in office or out, are often irresponsible in their use and abuse of freedoms of speech and press. They all make scapegoats of unpopular persons or classes and make promises of dubious sincerity or feasibility in order to win votes. All parties, when in opposition, strive to discredit and embarrass the Government of the day by spreading exaggerations and untruths and by inciting prejudiced or unreasoning discontent, not even hesitating to injure the Nation's prestige among the family of nations. The Communist Party, at least outwardly, only exaggerates these well-worn political techniques and many persons are thus led to think of it as just another more radical political party. If it were nothing but that, I think this legislation would be unconstitutional. There are, however, contradictions between what meets the eye and what is covertly done, which, in my view of the issues, provide a rational basis upon which Congress reasonably could have concluded[1] that the Communist Party is something different in fact from any other substantial party we have known, and hence may constitutionally be treated as something different in law.

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[1] Of course, it is not for any member of this Court to express or to act upon any opinion he may have as to the wisdom, effectiveness or need of this legislation. Our "inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154.

I.

From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party façade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. A rough and compressed grouping of this data [2] would permit Congress to draw these important conclusions as to its distinguishing characteristics.

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[2] It is unnecessary to set out a comprehensive compendium of the materials which Congress may or could have considered, or to review the voluminous evidence before its several Committees, much of which is already referred to in the Court's opinion. Most of this information would be of doubtful admissibility or credibility in a judicial proceeding. Its persuasiveness, validity and credibility for legislative purposes are for Congress, see n. 1, *supra*. I intimate no opinion as to its sufficiency for purposes of a criminal trial.

An introduction to the literature on the subject may be found in: Cohen and Fuchs, *Communism's Challenge and the Constitution*, 34 Cornell L. Q. 182; Moore, *The Communist Party of the U. S. A.*, 39 Am. Pol. Sci. Rev. 31; Timasheff, *The Schneiderman Case—Its Political Aspects*, 12 Ford. L. Rev. 209; Note, 32 Georgetown L. J. 405, 411–418; Emerson & Helfeld, *Loyalty Among Government Employees*, 58 Yale L. J. 1, 61–64; Donovan & Jones, *Program For a Democratic Counter Attack to Communist Penetration of Government Service*, 58 Yale L. J. 1211, 1215–1222; and see Notes, 48 Col. L. Rev. 253; 96 U. of Pa. L. Rev. 381; 1 Stanford L. Rev. 85; 23 Notre Dame Lawyer 577; 34 Va. L. Rev. 439, 450.

See also Mills, *The New Men of Power* (1948) 186–200; Levenstein, *Labor Today and Tomorrow* (1945) 159–177; Teller, *Management Functions under Collective Bargaining* (1947) 401–410; Smith, *Spotlight on Labor Unions* (1946) 40–43, 63–67, 79–82; Taft, *Economics and Problems of Labor* (1948) 499–501, 722; Saposs, *Left Wing Unionism* (1926) 48–65; Foster, *From Bryan to Stalin* (1937) 275–277; Gitlow, *I Confess* (1940) 334–395; *The Communist in Labor Relations Today* (Research Institute of America, New York, March 28, 1946); Baldwin, *Union Administration and Civil Liberties*, 248 Annals 54, 59; *Labor Abroad*, Dec. 1947, No. 5 (U. S. Dept. of

1. *The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.* It seeks not merely a change of administration, or of Congress, or reform legislation within the constitutional framework. Its program is not merely to socialize property more rapidly and extensively than the other parties are doing. While the difference between other parties in these matters is largely as to pace, the Communist Party's difference is one of direction.

The Communist program only begins with seizure of government, which then becomes a means to impose upon society an organization on principles fundamentally opposed to those presupposed by our Constitution. It purposes forcibly to recast our whole social and political structure after the Muscovite model of police-state dictatorship. It rejects the entire religious and cultural heritage of Western civilization, as well as the American economic and political systems. This Communist movement is a belated counter-revolution to the American Revolution, designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights, and overturn our system of free, representative self-government.

Goals so extreme and offensive to American tradition and aspiration obviously could not be attained or approached through order or with tranquility. If, by their better organization and discipline, they were successful, more candid Communists admit that it would be to an

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Labor, Bureau of Labor Statistics) 3; *Labor Abroad,* Feb. 1948, No. 6 (U. S. Dept. of Labor, Bureau of Labor Statistics) 1–3; *Postwar Labor Movement in Italy,* 68 Monthly Labor Review (U. S. Dept. of Labor, Bureau of Labor Statistics) 49. For the story of American political parties see Binkley, *American Political Parties* (2d ed., 1945); 2 Bryce, *The American Commonwealth* (2d ed. rev. 1891); and on the Communist Party, in addition to materials above cited, Odegard and Helms, *American Politics* (1938) 795–797.

accompaniment of violence, but at the same time they disclaim responsibility by blaming the violence upon those who engage in resistance or reprisal. It matters little by whom the first blow would be struck; no one can doubt that an era of violence and oppression, confiscations and liquidations would be concurrent with a regime of Communism.

Such goals set up a cleavage among us too fundamental to be composed by democratic processes. Our constitutional scheme of elections will not settle issues between large groups when the price of losing is to suffer extinction. When dissensions cut too deeply, men will fight, even hopelessly, before they will submit.[3] And this is the kind of struggle projected by the Communist Party and inherent in its program.

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[3] Such is the view of students of Western society, with outlook so opposed as Lord Balfour and Harold Laski. Balfour wrote:

"Our alternating Cabinets, though belonging to different parties, have never differed about the foundation of society, and it is evident that our whole political machinery presupposes a people so fundamentally at one that they can afford to bicker; and so sure of their own moderation that they are not dangerously disturbed by the never-ending din of political conflict. May it always be so." Preface to the World's Classics edition of Bagehot's *English Constitution*, p. xxiii.

Laski commented:

"In an interesting passage [citing the above] Lord Balfour has drawn attention to the fact that the success of the British Constitution in the Nineteenth Century—it is worth adding the general success of representative government—was built upon an agreement between parties in the state upon fundamental principles. There was, that is, a kindred outlook upon large issues; and since fighting was confined to matters of comparative detail, men were prepared to let reason have its sway in the realm of conflict. For it is significant that in the one realm where depth of feeling was passionate—Irish home rule—events moved rapidly to the test of the sword; and the settlement made was effected by violence and not by reason." Laski, *Liberty in the Modern State*, 238.

If we substitute the Civil War for Irish home rule, these statements become as applicable to the United States as they are to England.

2. *The Communist Party alone among American parties past or present is dominated and controlled by a foreign government.* It is a satrap party which, to the threat of civil disorder, adds the threat of betrayal into alien hands.

The chain of command from the Kremlin to the American party is stoutly denied and usually invisible, but it was unmistakably disclosed by the American Communist Party somersaulting in synchronism with shifts in the Kremlin's foreign policy. Before Munich, Soviet policy was anti-German—"anti-fascist"—and the Communists in this country were likewise. However, when Stalin concluded a nonaggression pact with Hitler and Nazi Germany and the Soviet Union became partners in the war, the Communists here did everything within their power to retard and embarrass the United States' policy of rendering aid short of war to victims of aggression by that evil partnership. When those partners again fell out and Russian policy once more became anti-German, the Communists in this country made an abrupt and fierce reversal and were unconscionable in their demands that American soldiers, whose equipment they had delayed and sabotaged, be sacrificed in a premature second front to spare Russia. American Communists, like Communists elsewhere in the world, placed Moscow's demand above every patriotic interest.

By lineage and composition the Communist Party will remain peculiarly susceptible to this alien control. The entire apparatus of Communism—its grievances, program, propaganda and vocabulary—were evolved for Eastern and Central Europe, whose social and political conditions bear no semblance to our own. However gifted may have been the Communist Party's founders and leaders—Marx, Engels, Lenin and Stalin—not one of them ever lived in America, experienced our conditions, or imbibed the spirit of our institutions. The Communist

Party is not native to this country and its beginnings here were not an effort of Americans to answer American problems. Nor is it the response to a quest by American political leaders for lessons from European experiences. As a consequence, the leaders of the American Communist Party have been otherwise insignificant personalities, without personal political followings or aptitudes for our political methods, adapted by training only to boring their way into the labor movement, minority groups and coteries of naïve and confused liberals, whose organizations they have captured and discredited and among whom they lie in wait for further orders.

The Old World may be rich in lessons which our statesmen could consult with advantage. But it is one thing to learn from or support a foreign power because that policy serves American interests, and another thing to support American policies because they will serve foreign interests.[4] In each country where the Communists have seized control, they have so denationalized its foreign policy as to make it a satellite and vassal of the Soviet Union and enforced a domestic policy in complete conformity with the Soviet pattern, tolerating no deviation in deference to any people's separate history, tradition or national interests.

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[4] To compare attacks against Thomas Jefferson with attacks against the Communist leaders—as Communists generally do [*e. g.* Dennis, *Let the People Know* (1947) 13]—would be meaningful only if his character and motives were comparable to those of the Communist leaders. When we consider that Jefferson was the author of Virginia's Statute of Religious Liberty, was war Governor of Virginia, risked his life to sign the Declaration of Independence, was Secretary of State in President Washington's Cabinet and became President of the United States through the influence of Alexander Hamilton, it seems sacrilegious to liken Jefferson's motives in supporting certain phases of French policy with Communist allegiance to the Kremlin.

3. *Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal.* It would be incredible naïveté to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power. In not one of the countries it now dominates was the Communist Party chosen by a free or contestible election; in not one can it be evicted by any election. The international police state has crept over Eastern Europe by deception, coercion, *coup d'état,* terrorism and assassination. Not only has it overpowered its critics and opponents; it has usually liquidated them. The American Communist Party has copied the organizational structure and its leaders have been schooled in the same technique and by the same tutors.

The American Communists have imported the totalitarian organization's disciplines and techniques, notwithstanding the fact that this country offers them and other discontented elements a way to peaceful revolution by ballot.[5] If they can persuade enough citizens, they may not only name new officials and inaugurate new policies, but, by amendment of the Constitution, they can abolish the Bill of Rights and set up an absolute government by legal methods. They are given liberties of speech, press and assembly to enable them to present to the people their proposals and propaganda for peaceful and lawful changes, however extreme. But instead of resting their case upon persuasion and any appeal inherent in their ideas and principles, the Communist Party adopts the techniques of a secret cabal—false names, forged passports, code messages, clandestine meetings. To these it adds occasional terroristic and threatening methods,

[5] Changes as decisive as those wrought by most revolutions resulted from the election of Jefferson in 1800, Jackson in 1828, Lincoln in 1860, and Roosevelt in 1932.

such as picketing courts and juries, political strikes and sabotage.

This cabalism and terrorism is understandable in the light of what they want to accomplish and what they have to overcome. The Communist program does not presently, nor in foreseeable future elections, commend itself to enough American voters to be a substantial political force. Unless the Communist Party can obtain some powerful leverage on the population, it is doomed to remain a negligible factor in the United States. Hence, conspiracy, violence, intimidation and the *coup d'état* are all that keep hope alive in the Communist breast.

4. *The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement.* All political parties have wooed labor and its leaders. But what other parties seek is principally the vote of labor. The Communist Party, on the other hand, is not primarily interested in labor's vote, for it does not expect to win by votes. It strives for control of labor's coercive power—the strike, the sit-down, the slow-down, sabotage, or other means of producing industrial paralysis. Congress has legalized the strike as labor's weapon for improving its own lot. But where Communists have labor control, the strike can be and sometimes is perverted to a party weapon. In 1940 and 1941, undisclosed Communists used their labor offices to sabotage this Nation's effort to rebuild its own defenses. Disguised as leaders of free American labor, they were in truth secret partisans of Stalin, who, in partnership with Hitler, was overrunning Europe, sending honest labor leaders to concentration camps, and reducing labor to slavery in every land either of them was able to occupy. No other important political party in our history has attempted to use the strike to nullify a foreign or a domestic policy adopted by those chosen under our representative system.

This labor leverage, however, usually can be obtained only by concealing the Communist tie from the union membership. Whatever grievances American workmen may have with American employers, they are too intelligent and informed to seek a remedy through a Communist Party which defends Soviet conscription of labor, forced labor camps and the police state. Hence the resort to concealment, and hence the resentment of laws to compel disclosure of Communist Party ties. The membership is not likely to entrust its bargaining power, its records, and its treasury to such hands. When it does, the union finds itself a more or less helpless captive of the Communist Party. Its officers cease to be interested in correcting grievances but seek to worsen and exploit them; they care less for winning strikes than that they be long, bitter and disruptive. They always follow the Communist Party line, without even knowing its source or its objectives. The most promising course of the Communist Party has been the undercover capture of the coercive power of strategic labor unions as a leverage to magnify its power over the American people.

5. *Every member of the Communist Party is an agent to execute the Communist program.* What constitutes a party? Major political parties in the United States have never been closely knit or secret organizations. Anyone who usually votes the party ticket is reckoned a member, although he has not applied for or been admitted to membership, pays no dues, has taken no pledge, and is free to vote, speak and act as he wills. Followers are held together by rather casual acceptance of general principles, the influence of leaders, and sometimes by the cohesive power of patronage. Membership in the party carries with it little assurance that the member understands or believes in its principles and none at all that he will take orders from its leaders. One may quarrel with the party and bolt its candidates and return

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again as much a member as those who were regular. And it is often a source of grief to those who have labored long in the vineyard that late arrivals are taken into the party councils from other parties without scrutiny. Of course, when party organization is of this character, there is little ground for inference that all members are committed to party plans or that they are agents for their execution.

Membership in the Communist Party is totally different. The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. They are provided with cards or credentials, usually issued under false names so that the identification can only be made by officers of the Party who hold the code. Moreover, each pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute "cells" in the factory, the office, the political society, or the labor union. For any deviation from the party line they are purged and excluded.

Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume such obligations are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party's program. The conspiracy principle has traditionally been employed to protect society against all "ganging up" or concerted action in violation of its laws. No term passes that this Court does not sustain convictions based on that doctrine for violations of the antitrust laws or other statutes.[6]

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[6] I have taken pains to point out that the whole doctrine of conspiracy and its abuse presents a danger to the fair administration of justice. Concurring opinion, *Krulewitch* v. *United States,* 336 U. S. 440, 445.

However, there has recently entered the dialectic of politics a cliché used to condemn application of the conspiracy principle to Communists. "Guilt by association" is an epithet frequently used and little explained, except that it is generally accompanied by another slogan, "guilt is personal." Of course it is; but personal guilt may be incurred by joining a conspiracy. That act of association makes one responsible for the acts of others committed in pursuance of the association. It is wholly a question of the sufficiency of evidence of association to imply conspiracy. There is certainly sufficient evidence that all members owe allegiance to every detail of the Communist Party program and have assumed a duty actively to help execute it, so that Congress could, on familiar conspiracy principles, charge each member with responsibility for the goals and means of the Party.

Such then is the background which Congress could reasonably find as a basis for exerting its constitutional powers, and which the judiciary cannot disregard in testing them. On this hypothesis we may revert to consideration of the contention of unconstitutionality of this oath insofar as it requires disclosure of Communist Party membership or affiliation.

II.

I cannot believe that Congress has less power to protect a labor union from Communist Party domination than it has from employer domination. This Court has uncompromisingly upheld power of Congress to disestablish labor unions where they are company-dominated and to eradicate employer influence, even when exerted only through spoken or written words which any person not the employer would be free to utter.[7]

Congress has conferred upon labor unions important rights and powers in matters that affect industry, trans-

[7] See cases collected in *Thomas* v. *Collins*, 323 U. S. 516, 548.

port, communications, and commerce. And Congress has not now denied any union full self-government nor prohibited any union from choosing Communist officers. It seeks to protect the union from doing so unknowingly. And if members deliberately choose to put the union in the hands of Communist officers, Congress withdraws the privileges it has conferred on the assumption that they will be devoted to the welfare of their members. It would be strange indeed if it were constitutionally powerless to protect these delegated functions from abuse and misappropriation to the service of the Communist Party and the Soviet Union. Our Constitution is not a covenant of nonresistance toward organized efforts at disruption and betrayal, either of labor or of the country.

Counsel stress that this is a civil-rights or a free-speech or a free-press case. But it is important to note what this Act does not do. The Act does not suppress or outlaw the Communist Party, nor prohibit it or its members from engaging in any aboveboard activity normal in party struggles under our political system. It may continue to nominate candidates, hold meetings, conduct campaigns and issue propaganda, just as other parties may. No individual is forbidden to be or to become a philosophical Communist or a full-fledged member of the Party. No one is penalized for writing or speaking in favor of the Party or its philosophy. Also, the Act does not require or forbid anything whatever to any person merely because he is a member of, or is affiliated with, the Communist Party. It applies only to one who becomes an officer of a labor union.

I am aware that the oath is resented by many labor leaders of unquestioned loyalty and above suspicion of Communist connections, indeed by some who have themselves taken bold and difficult steps to rid the labor movement of Communists. I suppose no one likes to be compelled to exonerate himself from connections he has never

acquired. I have sometimes wondered why I must file papers showing I did not steal my car before I can get a license for it. But experience shows there are thieves among automobile drivers, and that there are Communists among labor leaders. The public welfare, in identifying both, outweighs any affront to individual dignity.

In weighing claims that any particular activity is above the reach of law, we have a high responsibility to do so in the light of present-day actualities, not nostalgic idealizations valid for a simpler age. Our own world, organized for liberty, has been forced into deadly competition with another world, organized for power. We are faced with a lawless and ruthless effort to infiltrate and disintegrate our society. In cases involving efforts of Congress to deal with this struggle we are clearly called upon to apply the long-standing rule that an appointive Judiciary should strike down no act produced by the democratic processes of our representative system unless unconstitutionality is clear and certain.

I conclude that we cannot deny Congress power to take these measures under the Commerce Clause to require labor union officers to disclose their membership in or affiliation with the Communist Party.

III.

Congress has, however, required an additional disclaimer, which in my view does encounter serious constitutional objections. A union officer must also swear that "he does not believe in . . . the overthrow of the United States Government by force or by any illegal or unconstitutional methods." [8]

[8] The Act lays down other requirements for the oath which do not require extended discussion, as, for example, the clause "is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force." For reasons set forth in parts I and II, Congress would undoubtedly have power

If Congress has power to condition any right or privilege of an American citizen [9] upon disclosure and disavowal of belief on any subject, it is obviously this one. But the serious issue is whether Congress has power to proscribe any opinion or belief which has not manifested itself in any overt act. While the forepart of the oath requires disclosure and disavowal of relationships which depend on overt acts of membership or affiliation, the afterpart demands revelation and denial of mere beliefs or opinions, even though they may never have matured into any act whatever or even been given utterance. In fact, the oath requires one to form and express a conviction on an abstract proposition which many good citizens, if they have thought of it at all, have considered too academic and remote to bother about.

That this difference is decisive on the question of power becomes unmistakable when we consider measures of enforcement. The only sanction prescribed, and probably the only one possible in dealing with a false affidavit, is punishment for perjury. If one is accused of falsely stating that he was not a member of, or affiliated with, the Communist Party, his conviction would depend upon proof of visible and knowable overt acts or courses of conduct sufficient to establish that relationship. But if one is accused of falsely swearing that he did not believe

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to require disclosure of membership in an organization which had the characteristics of the Communist Party or other characteristics of similar gravity. As drawn, this clause might, however, apply to membership in a mere philosophical or discussion group.

[9] This part of the oath was obviously intended to disclose persons not members of or affiliated with the Communist Party but who were a part of the undertow of the Communist movement. It was probably suggested by the long-standing requirement of somewhat similar oaths in immigration and naturalization matters. There is, however, no analogy between what Congress may require of aliens as a condition of admission or of citizenship and what it may require of a citizen.

something that he really did believe, the trial must revolve around the conjecture as to whether he candidly exposed his state of mind.

The law sometimes does inquire as to mental state, but only so far as I recall when it is incidental to, and determines the quality of, some overt act in question. From its circumstances, courts sometimes must decide whether an act was committed intentionally or whether its results were intended, or whether the action taken was in malice, or after deliberation, or with knowledge of certain facts. But in such cases the law pries into the mind only to determine the nature and culpability of an act, as a mitigating or aggravating circumstance, and I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred.[10] Our trial processes are clumsy and unsatisfying for inferring cogitations which are incidental to actions, but they do not even pretend to ascertain the thought that has had no outward manifestation. Attempts of the courts to fathom modern political meditations of an accused would be as futile and mischievous as the efforts in the infamous heresy trials of old to fathom religious beliefs.

Our Constitution explicitly precludes punishment of the malignant mental state alone as treason, most serious of all political crimes, of which the mental state of adherence to the enemy is an essential part. It requires a duly witnessed overt act of aid and comfort to the enemy. *Cramer* v. *United States,* 325 U. S. 1. It is true that in England of olden times men were tried for treason for mental indiscretions such as imagining the death of the king. But our Constitution was intended to end such prosecutions. Only in the darkest periods of human his-

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[10] See Holmes, *The Common Law,* Lectures II, III and IV, pp. 65–68, 132 *et seq.*

tory has any Western government concerned itself with mere belief, however eccentric or mischievous, when it has not matured into overt action; and if that practice survives anywhere, it is in the Communist countries whose philosophies we loathe.

How far we must revert toward these discredited systems if we are to sustain this oath is made vivid by the Court's reasoning that the Act applies only to those "whose beliefs strongly indicate a will to engage in political strikes . . . ." Since Congress has never outlawed the political strike itself, the Court must be holding that Congress may root out mere ideas which, even if acted upon, would not result in crime. It is a strange paradox if one may be forbidden to have an idea in mind that he is free to put into execution. But apart from this, efforts to weed erroneous beliefs from the minds of men have always been supported by the argument which the Court invokes today, that beliefs are springs to action, that evil thoughts tend to become forbidden deeds. Probably so. But if power to forbid acts includes power to forbid contemplating them, then the power of government over beliefs is as unlimited as its power over conduct and the way is open to force disclosure of attitudes on all manner of social, economic, moral and political issues.

These suggestions may be discounted as fanciful and farfetched. But we must not forget that in our country are evangelists and zealots of many different political, economic and religious persuasions whose fanatical conviction is that all thought is divinely classified into two kinds—that which is their own and that which is false and dangerous. Communists are not the only faction which would put us all in mental strait jackets. Indeed all ideological struggles, religious or political, are primarily battles for dominance over the minds of people. It is not to be supposed that the age-old readiness to

try to convert minds by pressure or suppression, instead of reason and persuasion, is extinct. Our protection against all kinds of fanatics and extremists, none of whom can be trusted with unlimited power over others, lies not in their forbearance but in the limitations of our Constitution.

It happens that the belief in overthrow of representative government by force and violence which Congress conditionally proscribes is one that I agree is erroneous. But "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." Holmes, J., dissenting in *United States* v. *Schwimmer,* 279 U. S. 644, 654–55. Moreover, in judging the power to deny a privilege to think otherwise, we cannot ignore the fact that our own Government originated in revolution and is legitimate only if overthrow by force may sometimes be justified. That circumstances sometimes justify it is not Communist doctrine but an old American belief.[11]

The men who led the struggle forcibly to overthrow lawfully constituted British authority found moral support by asserting a natural law under which their revolution was justified, and they broadly proclaimed these beliefs in the document basic to our freedom. Such sentiments have also been given ardent and rather ex-

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[11] Nothing is more pernicious than the idea that every radical measure is "Communistic" or every liberal-minded person a "Communist." One of the tragedies of our time is the confusion between reform and Communism—a confusion to which both the friends and enemies of reform have contributed, the one by failing to take a clear stand against Communists and Communism and the other by characterizing even the most moderate suggestion of reform as "Communistic" and its advocates as "Communists." Unquestioning idolatry of the *status quo* has never been an American characteristic.

travagant expression by Americans of undoubted patriotism.[12] Most of these utterances were directed against a tyranny which left no way to change by suffrage. It seems to me a perversion of their meaning to quote them, as the Communists often do, to sanction violent attacks upon a representative government which does afford such means. But while I think Congress may make it a crime

[12] A surprising catalogue of statements could be compiled. The following are selected from Mencken, *A New Dictionary of Quotations,* under the rubric "Revolution": "Whenever any government becomes destructive of these ends [life, liberty and the pursuit of happiness] it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." Thomas Jefferson, *The Declaration of Independence,* July 4, 1776. "The community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish government, in such manner as shall be by that community judged most conducive to the public weal." The Pennsylvania Declaration of Rights, 1776. "It is an observation of one of the profoundest inquirers into human affairs that a revolution of government is the strongest proof that can be given by a people of their virtue and good sense." John Adams, *Diary,* 1786. "What country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms." Thomas Jefferson, *Letter to W. S. Smith,* Nov. 13, 1787. "An oppressed people are authorized whenever they can to rise and break their fetters." Henry Clay, Speech in the House of Representatives, March 4, 1818. "Any people anywhere, being inclined and having the power, have the right to rise up and shake off the existing government and form a new one that suits them better." Abraham Lincoln, Speech in the House of Representatives, 1848. "All men recognize the right of revolution: that is, the right to refuse allegiance to, and to resist, the government when its tyranny or its inefficiency are great and unendurable." H. D. Thoreau, *An Essay on Civil Disobedience,* 1849. "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it." Abraham Lincoln, Inaugural Address, March 4, 1861. "Whenever the ends of govern-

to take one overt step to use or to incite violence or force against our Government, I do not see how in the light of our history a mere belief that one has a natural right under some circumstances to do so can subject an American citizen to prejudice any more than possession of any other erroneous belief. Can we say that men of our time must not even think about the propositions on

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ment are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of a right ought to reform the old, or establish a new government; the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind." Declaration of Rights of Maryland, 1867. "The right of revolution is an inherent one. When people are oppressed by their government, it is a natural right they enjoy to relieve themselves of the oppression, if they are strong enough, either by withdrawal from it, or by overthrowing it and substituting a government more acceptable." U. S. Grant, *Personal Memoirs*, I, 1885.

Quotations of similar statements could be multiplied indefinitely. Of course, these quotations are out of their context and out of their times. And despite their abstract theories about revolt, it should also be noted that Adams, Jefferson, Lincoln and Grant were uncompromising in putting down any show of rebellion toward the Government they headed.

The revolutionary origin of our own Government has inclined Americans to value revolution as a means to liberty and loosely to think that all revolutionists are liberals. The fact is, however, that violent revolutions are rare which do more in the long run than to overthrow one tyranny to make way for another. The cycle from revolt to reaction has taken less than a score of bloody years in the great revolutions. The Puritan Commonwealth under Cromwell led but to the Restoration; the French by revolution escaped from the reign of Louis XVI to the dictatorship of Napoleon; the Russians overthrew the Czar and won the dictatorship of Lenin and Stalin; the Germans deposed the Kaiser and fell victims of a dictatorship by Hitler. I am convinced that force and violence do not serve the cause of liberty as well as nonviolence. See Fischer, *Gandhi and Stalin, passim.*

But the sentiments I have quoted have strong appeal to the impetuous and are deeply imbedded in American tradition.

which our own Revolution was justified? Or may they think, provided they reach only one conclusion—and that the opposite of Mr. Jefferson's?

While the Governments, State and Federal, have expansive powers to curtail action, and some small powers to curtail speech or writing, I think neither has any power, on any pretext, directly or indirectly to attempt foreclosure of any line of thought. Our forefathers found the evils of free thinking more to be endured than the evils of inquest or suppression. They gave the status of almost absolute individual rights to the outward means of expressing belief. I cannot believe that they left open a way for legislation to embarrass or impede the mere intellectual processes by which those expressions of belief are examined and formulated. This is not only because individual thinking presents no danger to society, but because thoughtful, bold and independent minds are essential to wise and considered self-government.

Progress generally begins in skepticism about accepted truths. Intellectual freedom means the right to re-examine much that has been long taken for granted. A free man must be a reasoning man, and he must dare to doubt what a legislative or electoral majority may most passionately assert. The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all. Our Constitution relies on our electorate's complete ideological freedom to nourish independent and responsible intelligence and preserve our democracy from that submissiveness, timidity and herd-mindedness of the masses which would foster a tyranny of mediocrity. The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the

citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored.

The idea that a Constitution should protect individual nonconformity is essentially American and is the last thing in the world that Communists will tolerate. Nothing exceeds the bitterness of their demands for freedom for themselves in this country except the bitterness of their intolerance of freedom for others where they are in power.[13] An exaction of some profession of belief or nonbelief is precisely what the Communists would enact—each individual must adopt the ideas that are common to the ruling group. Their whole philosophy is to minimize man as an individual and to increase the power of man acting in the mass. If any single characteristic distinguishes our democracy from Communism it is our recognition of the individual as a personality rather than as a soulless part in the jigsaw puzzle that is the collectivist state.

I adhere to views I have heretofore expressed, whether the Court agreed, *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, or disagreed, see dissenting opinion in *United States* v. *Ballard,* 322 U. S. 78, 92, that our Constitution excludes both general and local governments from the realm of opinions and ideas, beliefs and doubts, heresy and orthodoxy, political, religious or scientific. The right to speak out, or to publish, also

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[13] Prime Minister Attlee recently stated: "I constantly get hypocritical resolutions protesting against alleged infringements of freedom in this country. I get protests because we keep out from places where secret work is carried on people who cannot be trusted. This from Communists who know that their fellows in Communist countries carry on a constant purge and ruthlessly remove from office anyone who shows the slightest sign of deviating from what their rulers consider to be orthodoxy. It is sickening hypocrisy." London Times Weekly Edition, July 6, 1949.

is protected when it does not clearly and presently threaten some injury to society which the Government has a right to protect. Separate opinion, *Thomas* v. *Collins,* 323 U. S. 516. But I have protested the degradation of these constitutional liberties to immunize and approve mob movements, whether those mobs be religious or political, radical or conservative, liberal or illiberal, *Douglas* v. *City of Jeannette,* 319 U. S. 157; *Terminiello* v. *Chicago,* 337 U. S. 1, 13, or to authorize pressure groups to use amplifying devices to drown out the natural voice and destroy the peace of other individuals. *Saia* v. *People of New York,* 334 U. S. 558; *Kovacs* v. *Cooper,* 336 U. S. 77. And I have pointed out that men cannot enjoy their right to personal freedom if fanatical masses, whatever their mission, can strangle individual thoughts and invade personal privacy. *Martin* v. *Struthers,* 319 U. S. 141, dissent at 166. A catalogue of rights was placed in our Constitution, in my view, to protect the individual in his individuality, and neither statutes which put those rights at the mercy of officials nor judicial decisions which put them at the mercy of the mob are consistent with its text or its spirit.

I think that under our system, it is time enough for the law to lay hold of the citizen when he acts illegally, or in some rare circumstances when his thoughts are given illegal utterance. I think we must let his mind alone.[14]

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[14] The Court appears to recognize and compound the constitutional weakness of this statute and, to save this part of the oath from unconstitutionality, declines to read the text "very literally." It renders the Act to call for disclaimer of belief in forcible overthrow only as an objective but not as a prophecy. And furthermore, one is allowed to believe in forcible overthrow, even as an objective, so long as the belief does not relate to the Government "as it now exists." I think we do not make an Act constitutional by making it vague but only compound its invalidity. *Cf. Winters* v. *New York,* 333 U. S. 507.

IV.

The task of this Court to maintain a balance between liberty and authority is never done, because new conditions today upset the equilibriums of yesterday. The seesaw between freedom and power makes up most of the history of governments, which, as Bryce points out, on a long view consists of repeating a painful cycle from anarchy to tyranny and back again. The Court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend existence of our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression. These are the competing considerations involved in judging any measures which government may take to suppress or disadvantage its opponents and critics.

I conclude that today's task can only be discharged by holding that all parts of this oath which require disclosure of overt acts of affiliation or membership in the Communist Party are within the competence of Congress to enact and that any parts of it that call for a disclosure of belief unconnected with any overt act are beyond its power.[15]

MR. JUSTICE BLACK, dissenting.

We have said that "Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind."[1] But people can be, and in less democratic countries have

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[15] This conclusion, if it prevailed, would require decision of the effect of partial invalidity on the whole and the applicability of the severability clause. As it does not prevail, discussion of the question would be academic.

[1] Dissenting opinion in *Jones* v. *Opelika*, 316 U. S. 584, 618, adopted as the Court's opinion in 319 U. S. 103. See also *Cantwell* v. *Connecticut*, 310 U. S. 296, 303.

been, made to suffer for their admitted or conjectured thoughts. Blackstone recalls that Dionysius is "recorded to have executed a subject, barely for dreaming that he had killed him; which was held for a sufficient proof, that he had thought thereof in his waking hours." [2] Such a result, while too barbaric to be tolerated in our nation, is not illogical if a government can tamper in the realm of thought and penalize "belief" on the ground that it might lead to illegal conduct. Individual freedom and governmental thought-probing cannot live together. As the Court admits even today, under the First Amendment "Beliefs are inviolate."

Today's decision rejects that fundamental principle. The Court admits, as it must, that the "proscriptions" of § 9 (h) of the National Labor Relations Act as amended by the Taft-Hartley Act rest on "beliefs and political affiliations," and that "Congress has undeniably discouraged the lawful exercise of political freedoms" which are "protected by the First Amendment." These inescapable facts should compel a holding that § 9 (h) conflicts with the First Amendment.

Crucial to the Court's contrary holding is the premise that congressional power to regulate trade and traffic includes power to proscribe "beliefs and political affiliations." No case cited by the Court provides the least vestige of support for thus holding that the Commerce Clause restricts the right to think. On the contrary, the First Amendment was added after adoption of the Constitution for the express purpose of barring Congress from using previously granted powers to abridge belief or its expression. Freedom to think is inevitably abridged when beliefs are penalized by imposition of civil disabilities.

Since § 9 (h) was passed to exclude certain beliefs from one arena of the national economy, it was quite natural

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[2] 4 Blackstone, Commentaries 79 (6th ed. Dublin 1775).

to utilize the test oath as a weapon. History attests the efficacy of that instrument for inflicting penalties and disabilities on obnoxious minorities. It was one of the major devices used against the Huguenots in France, and against "heretics" during the Spanish Inquisition. It helped English rulers identify and outlaw Catholics, Quakers, Baptists, and Congregationalists—groups considered dangerous for political as well as religious reasons.[3] And wherever the test oath was in vogue, spies and informers found rewards far more tempting than truth.[4] Painful awareness of the evils of thought espionage made

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[3] The increasing restrictions and punishment imposed on these groups are shown by the following examples. In 1558 Parliament prescribed an oath, which no conscientious Catholic could take, for all judges, ecclesiastical ministers, those receiving pay from the Queen, and those taking university degrees; four years later the oath was extended to schoolmasters, lawyers, sheriffs, and court officers. In 1593 all Protestants were required to attend Anglican services and forbidden to hold nonconformist religious meetings. And Catholics convicted of failing to attend Anglican services regularly were restricted to within five miles of their dwellings. In 1609 such Catholics were barred even from serving as executors, guardians, physicians, or apothecaries, and their right to prosecute suits in court was practically abolished; it was also made treason to be converted or convert anyone else to Catholicism. Between 1661 and 1677, Parliament outlawed attendance at any non-Anglican religious services, and required those holding civil, military, or municipal office to subscribe to an oath which effectively barred Catholics and non-Anglican Protestants. Punishment for violations of these and the many similar statutes ranged from fines and imprisonment to exile and death. See, *e. g.*, 1 Eliz. c. 1; 5 Eliz. c. 1; 35 Eliz. cc. 1, 2; 3 Jac. I cc. 4, 5; 7 Jac. I cc. 2, 6; 13 Car. II Stat. 2, c. 1; 13 & 14 Car. II cc. 1, 4, 33; 22 Car. II c. 1; 25 Car. II c. 2; 30 Car. II Stat. 2.

As for the political motivations and objectives of these statutes, see, *e. g.*, the declaration of purpose in 35 Eliz. c. 2, quoted in note 7 *infra*.

[4] Under the Stuart monarchs in England it was standard practice to give an informer one-third of the fines collected from his victim. *E. g.*, 3 Jac. I c. 5. And a few were sufficiently daring and un-

such oaths "an abomination to the founders of this nation," *In re Summers,* 325 U. S. 561, 576, dissenting opinion. Whether religious, political, or both, test oaths are implacable foes of free thought. By approving their imposition, this Court has injected compromise into a field where the First Amendment forbids compromise.

The Court assures us that today's encroachment on liberty is just a small one, that this particular statutory provision "touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint." But not the least of the virtues of the First Amendment is its protection of each member of the smallest and most unorthodox minority. Centuries of experience testify that laws aimed at one political or religious group, however rational these laws may be in their beginnings, generate hatreds and prejudices which rapidly spread beyond control. Too often it is fear which inspires such passions, and nothing is more reckless or contagious. In the resulting hysteria, popular indignation tars with the same brush

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scrupulous to obtain the more satisfying reward of fame. A notorious example took place in England during the reign of Charles II:

"The political atmosphere was electric. . . . Thus it is not strange that when Titus Oates, an Anglican clergyman who had been reconciled the year before to Rome, came forward in August, 1678, to denounce a vast Jesuit conspiracy against the King's life and the Protestant religion, his tale of wild lies met with a degree of credence that later ages would perhaps have refused to it. . . . The Pope, he declared, had commanded, and the Jesuits undertaken, a conquest of the kingdom; . . . . In all the arrangements he had been, he said, a trusted emissary . . . . Over a hundred conspirators, mostly Jesuits, were mentioned by name . . . . Oates was examined at the Council Board. The King caught him lying, but the extent and gravity of his charges demanded investigation; . . . . In one important point Oates' story was confirmed. . . . There was no 'plot' in Oates' sense; but there was quite enough of plotting to cost men their heads under the English law of treason . . . ." 5 Cambridge Modern History 220–221.

all those who have ever been associated with any member of the group under attack or who hold a view which, though supported by revered Americans as essential to democracy, has been adopted by that group for its own purposes.

Under such circumstances, restrictions imposed on proscribed groups are seldom static,[5] even though the rate of expansion may not move in geometric progression from discrimination to arm-band to ghetto and worse. Thus I cannot regard the Court's holding as one which merely bars Communists from holding union office and nothing more. For its reasoning would apply just as forcibly to statutes barring Communists and their suspected sympathizers from election to political office, mere membership in unions, and in fact from getting or holding any jobs whereby they could earn a living.

The Court finds comfort in its assurance that we need not fear too much legislative restriction of political belief or association "while this Court sits." That expression, while felicitous, has no validity in this particular constitutional field. For it springs from the assumption that individual mental freedom can be constitutionally abridged whenever any majority of this Court finds a satisfactory legislative reason. Never before has this Court held that the Government could for any reason attaint persons for their political beliefs or affiliations. It does so today.

Today the "political affiliation" happens to be the Communist Party: testimony of an ex-Communist that some Communist union officers had called "political

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[5] See note 3 *supra*. And see the comment on such legislation in 2 Hallam, The Constitutional History of England 473 (London, 1829): "It is the natural consequence of restrictive laws to aggravate the disaffection which has served as their pretext; and thus to create a necessity for a legislature that will not retrace its steps, to pass still onward in the course of severity."

strikes" is held sufficient to uphold a law coercing union members not to elect any Communist as an officer. Under this reasoning, affiliations with other political parties could be proscribed just as validly. Of course there is no practical possibility that either major political party would turn this weapon on the other, even though members of one party were accused of "political lockouts" a few years ago and members of the other are now charged with fostering a "welfare state" alien to our system. But with minor parties the possibility is not wholly fanciful. One, for instance, advocates socialism; [6] another allegedly follows the Communist "line"; still another is repeatedly charged with a desire and purpose to deprive Negroes of equal job opportunities. Under today's opinion Congress could validly bar all members of these parties from officership in unions or industrial corporations; the only showing required would be testimony that some members in such positions had, by attempts to further their party's purposes, unjustifiably fostered industrial strife which hampered interstate commerce.

It is indicated, although the opinion is not thus limited and is based on threats to commerce rather than to national security, that members of the Communist Party or its "affiliates" can be individually attainted without danger to others because there is some evidence that as a group they act in obedience to the commands of a foreign power. This was the precise reason given in Sixteenth-Century England for attainting all Catholics unless they subscribed to test oaths wholly incompatible with their

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[6] Proscriptions based on affiliation with the Socialist Party are not unprecedented. In 1920 the New York Assembly, upon allegations that the party was disloyal, suspended five legislators elected on the Socialist ticket. The vigorous protests of a Bar Association committee headed by Charles Evans Hughes, later Chief Justice of this Court, were of no avail. See John Lord O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592, 593.

religion.[7] Yet in the hour of crisis, an overwhelming majority of the English Catholics thus persecuted rallied loyally to defend their homeland against Spain and its Catholic troops.[8] And in our own country Jefferson and his followers were earnestly accused of subversive allegiance to France.[9] At the time, imposition of civil disability on all members of his political party must have seemed at least as desirable as does § 9 (h) today. For at stake, so many believed, was the survival of a newly-founded nation, not merely a few potential interruptions of commerce by strikes "political" rather than economic in origin.

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[7] 35 Eliz. c. 2, for example, was aimed at "sundry wicked and seditious Persons, who terming themselves Catholicks, and being indeed Spies and Intelligencers, . . . and hiding their most detestable and devilish Purposes under a false Pretext of Religion and Conscience, do secretly wander and shift from Place to Place within this Realm, to corrupt and seduce her Majesty's Subjects, and to stir them to Sedition and Rebellion."

[8] As is evidenced by the statute quoted in note 7 *supra,* the test oaths, the drastic restrictions and the punishment imposed on Catholics were "based on the assumption that all Catholics were politically hostile to the Queen, and were at one with Allen and the Jesuits in seeking her deposition and the conquest of the country by Spain. The patriotic action of the Catholics at home through the crisis of the Spanish Armada proved the weakness of this assumption. In the hour of peril the English Catholics placed loyalty to their Queen and country before all other considerations. . . . The injustice of imputing treachery to the whole Catholic population was proved beyond question." 3 Cambridge Modern History 351.

[9] Castigating Jefferson and his followers as "jacobins," a "French faction" guilty of "subversion," Fisher Ames warned: "[T]he jacobins have at last made their own discipline perfect: they are trained, officered, regimented and formed to subordination, in a manner that our militia have never yet equalled. . . . [A]nd it is as certain as any future event can be, that they will take arms against the laws as soon as they dare . . . ." Ames, Laocoon, printed in Works of Fisher Ames 94, 101, 106 (Boston, 1809).

These experiences underline the wisdom of the basic constitutional precept that penalties should be imposed only for a person's own conduct, not for his beliefs or for the conduct of others with whom he may associate. Guilt should not be imputed solely from association or affiliation with political parties or any other organization, however much we abhor the ideas which they advocate. *Schneiderman* v. *United States*, 320 U. S. 118, 136–139.[10] Like anyone else, individual Communists who commit overt acts in violation of valid laws can and should be punished. But the postulate of the First Amendment is that our free institutions can be maintained without proscribing or penalizing political belief, speech, press, assembly, or party affiliation.[11] This is a far bolder philosophy

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[10] And see, *e. g.*, John Lord O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592. That article quotes the following from a Memorial submitted to the New York Assembly by a special committee of the Bar Association of the City of New York protesting the suspension of five Socialist legislators: "it is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts . . . ." O'Brian points out that this Memorial was "largely written by" Charles Evans Hughes. *Id.* at 594.

[11] "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it. I know, indeed, that some honest men fear that a republican government cannot be strong; that this government is not strong enough. But would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm, on the theoretic and visionary fear that this government, the world's best hope, may by possibility want energy to preserve itself?" Thomas Jefferson, First Inaugural Address, March 4, 1801. This address, along with other writings on freedoms guaranteed by the First Amendment, is reprinted in Jones, Primer of Intellectual Freedom 142 (Harvard University Press, 1949).

than despotic rulers can afford to follow. It is the heart of the system on which our freedom depends.

Fears of alien ideologies have frequently agitated the nation and inspired legislation aimed at suppressing advocacy of those ideologies.[12] At such times the fog of public excitement obscures the ancient landmarks set up in our Bill of Rights. Yet then, of all times, should this Court adhere most closely to the course they mark. This was done in *De Jonge* v. *Oregon*, 299 U. S. 353, 365, where the Court struck down a state statute making it a crime to participate in a meeting conducted by Communists. It had been stipulated that the Communist Party advocated violent overthrow of the Government. Speaking through Chief Justice Hughes, a unanimous Court calmly announced time-honored principles that should govern this Court today: "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

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[12] For discussion of early American models, the Alien and Sedition Acts, see Bowers, Jefferson and Hamilton, 1925, c. XVI, "Hysterics," and c. XVII, "The Reign of Terror"; 1 Morison, Life of Otis, c. VIII, "A System of Terror."

INTERNATIONAL UNION OF UNITED AUTOMOBILE, ETC. WORKERS OF AMERICA, C. I. O., ET AL. *v.* O'BRIEN, PROSECUTING ATTORNEY, ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 456. Argued March 30, 1950.—Decided May 8, 1950.

The strike-vote provisions of the Michigan labor mediation law, Mich. Comp. Laws, 1948, §§ 423.1 *et seq.*, which prohibit the calling of a strike unless a state-prescribed procedure for mediation is followed and unless a majority of the employees in a state-defined bargaining unit authorizes the strike in a state-conducted election, conflict with the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, and are invalid under the Commerce Clause of the Federal Constitution. Pp. 455–459.

325 Mich. 250, 38 N. W. 2d 421, reversed.

In a suit by appellants to enjoin possible criminal prosecution for a violation of Mich. Comp. Laws, 1948, §§ 423.1 *et seq.*, a Michigan trial court held those sections invalid under the Federal Constitution. The Supreme Court of Michigan reversed. 325 Mich. 250, 38 N. W. 2d 421. On appeal to this Court, *reversed,* p. 459.

Joseph L. Rauh, Jr. argued the cause for appellants. With him on the brief was *Irving J. Levy.*

By special leave of Court, *David P. Findling* argued the cause for the National Labor Relations Board, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Perlman, Robert N. Denham* and *Mozart G. Ratner. Ruth Weyand* was also of counsel.

Edmund E. Shepherd, Solicitor General of Michigan, argued the cause for appellees. With him on the brief were *Stephen J. Roth,* Attorney General, and *Daniel J. O'Hara,* Assistant Attorney General. *Phillip A. McHugh* was also of counsel.

David Previant and *George S. Fitzgerald* filed a brief for the Michigan State Federation of Labor et al., as *amici curiae,* urging reversal.

Briefs of *amici curiae* supporting appellees were filed by *Thomas E. Fairchild,* Attorney General, *Stewart G. Honeck,* Deputy Attorney General, and *Beatrice Lampert,* Assistant Attorney General, of Wisconsin, and *Harold R. Fatzer,* Attorney General of Kansas, on behalf of the States of Kansas and Wisconsin; and by *Leon B. Lamfrom* for the Employers Association of Milwaukee.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

The constitutionality of the strike vote provision of the Michigan labor mediation law[1] is before us in this case. Appellants struck against Chrysler Corporation in May, 1948, without conforming to the prescribed state procedure. The strike was called to enforce demands for

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[1] Mich. Stat. Ann. (Cum. Supp. 1949) §§ 17.454 (1) *et seq.*; Mich. Comp. Laws, 1948, §§ 423.1 *et seq.* At the time of appellants' strike, the pertinent provisions of the law read as follows:

"Sec. 9. No strike or lockout shall take place or be put into effect until and unless each of the steps have been taken and the requirements complied with as provided in this act.

"1. In the event the parties thereto are unable to settle any dispute, the employees or their representative, in the case of impending strike, or the employer or his agent, in the case of an impending lockout, shall serve notice upon the board of such dispute together with a statement of the issues involved. . . . not less than 10 days before the strike or lockout is to become effective, or in case of an industry affected with a public interest or a public utility or hospital, said notice shall be so served not less than 30 days before the strike or lockout is to become effective.

"2. Upon receipt of such notice it shall be the duty of the board to exercise the powers herein granted to effect a settlement of such dispute by mediation between the parties. Prior to the calling of an election as provided hereinafter, it shall be the duty of each of the

higher wages, and it was conducted peacefully. To enjoin possible criminal prosecution,[2] appellants instituted this suit in the state courts, contending that the statute violated the Due Process and Commerce Clauses of the Federal Constitution. The trial court upheld their contentions but the Michigan Supreme Court reversed. 325 Mich. 250, 38 N. W. 2d 421 (1949). We find no need to discuss the due process point, inasmuch as we hold that the court below erred in its decision on the commerce power.

Congress has not been silent on the subject of strikes in interstate commerce. In the National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C. § 151, as amended by the Labor Management Relations Act, 1947, 61 Stat.

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parties to such dispute to actively and in good faith participate in the mediation thereof. . . .

"Sec. 9a. In the event that it becomes apparent to the board that there is no reasonable probability of settlement of such dispute by mediation and that further efforts to that end would be without avail, there shall be held in the case of any impending strike, an election upon such issue which election shall be conducted and supervised by the board. In the event either party to said dispute notifies the board in writing . . . that in the opinion of such party, further efforts to settle such dispute by mediation would be without avail, it shall be the duty of the board to cause an election to be held within 10 days of the receipt of such notice unless it is not practical to hold such election within said period, in which event said election shall be held within 20 days of receipt of such notice . . . . Every employee in the bargaining unit shall be entitled to vote in such election and in order to authorize a strike under the provisions of this act, a majority of all employees in such bargaining unit must vote in favor of such action."

In 1949, the last requirement was amended to read, "a majority of all employees casting valid ballots must vote in favor of such action." This change is not material to our decision.

[2] The court below held that appellants' acts "rendered [them] subject to threatened criminal prosecution . . . ." 325 Mich. at 254, 38 N. W. 2d at 422. See § 22. We are of course bound by this interpretation of the state law.

136, 29 U. S. C. (Supp. III) § 141, Congress safeguarded the exercise by employees of "concerted activities" and expressly recognized the right to strike.[3] It qualified and regulated that right in the 1947 Act. It established certain prerequisites, with which appellants complied, for any strike over contract termination or modification. § 8 (d). These include notices to both state and federal[4] mediation authorities; both did participate in the negotiations in this case. In provisions which did not affect appellants, Congress forbade strikes for certain objectives and detailed procedures for strikes which might create a national emergency. §§ 8 (b) (4), 206–210. None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation. *Plankinton Packing Co.* v. *Wisconsin Board,* 338 U. S. 953 (1950); *La Crosse Telephone Corp.* v. *Wisconsin Board,* 336 U. S. 18 (1949); *Bethlehem Steel Co.* v. *New York Labor Board,* 330 U. S. 767 (1947); *Hill* v. *Florida,* 325 U. S. 538 (1945).

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[3] See §§ 7, 2 (3), 13 of both Acts; H. R. Rep. No. 510, 80th Cong., 1st Sess. 59 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 28 (1947); statement of Senator Taft, 93 Cong. Rec. 3835 (1947), which includes the following: "That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. . . . We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions. . . . So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation."

[4] Congress created a new federal agency, the Federal Mediation and Conciliation Service, to assist in the peaceful settlement of disputes. §§ 202–204.

Even if some state legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the federal Act. The Michigan law calls for a notice given "In the event the parties . . . are unable to settle any dispute" to be followed by mediation, and if that is unsuccessful, by a strike vote within twenty days, with a majority required to authorize a strike. Under the federal legislation, the prescribed strike notice can be given sixty days before the contract termination or modification. § 8 (d). The federal Act thus permits strikes at a different and usually earlier time than the Michigan law; and it does not require majority authorization for any strike. This requirement of approval by a majority of the employees was contained in the Bill which passed the House of Representatives; [5] but the Act as finally adopted deliberately refrains from imposing the prerequisite of majority approval in each of its references to strike votes. §§ 203 (c), 209 (b)–210.

Finally, the bargaining unit established in accordance with federal law may be inconsistent with that required by state regulation. Though the unit for the Michigan strike vote cannot extend beyond the State's borders, the unit for which appellant union is the federally certified bargaining representative includes Chrysler plants in California and Indiana as well as Michigan. *Chrysler Corp.*, 42 N. L. R. B. 1145 (1942). Without question, the Michigan provision conflicts with the exercise of federally protected labor rights. A state statute

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[5] H. R. 3020, 80th Cong., 1st Sess. § 2 (11) (B) (vi) (h) (1947). The legislative history demonstrates that this proposal was rejected on the merits, and not because of any desire to leave the states free to adopt it. See, *e. g.*, H. R. Rep. No. 510, 80th Cong., 1st Sess. 34–35 (1947); testimony of Governor Stassen, Hearings before Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess. 562–65, 572–78, 586–89 (1947).

so at war with federal law cannot survive. *Plankinton Packing Co.* v. *Wisconsin Board,* 338 U. S. 953 (1950); *La Crosse Telephone Corp.* v. *Wisconsin Board,* 336 U. S. 18 (1949); *Bethlehem Steel Co.* v. *New York Labor Board,* 330 U. S. 767 (1947); *Hill* v. *Florida,* 325 U. S. 538 (1945).

Auto. Workers v. *Wisconsin Board,* 336 U. S. 245 (1949), upon which Michigan principally relies, was not concerned with a traditional, peaceful strike for higher wages. The employees' conduct there was "a new technique for bringing pressure upon the employer," a "recurrent or intermittent unannounced stoppage of work to win unstated ends." *Id.* at 249, 264. That activity we regarded as "coercive," similar to the sit-down strike held to fall outside the protection of the federal Act in *Labor Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240 (1939), and to the labor violence held to be subject to state police control in *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740 (1942). In the Wisconsin *Auto. Workers* case, we concluded that the union tactic was "neither forbidden by federal statute nor was it legalized and approved thereby." 336 U. S. at 265. "There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the State or it is entirely ungoverned." *Id.* at 254. Clearly, we reaffirmed the principle that if "Congress has protected the union conduct which the State has forbidden . . . the state legislation must yield." *Id.* at 252. That principle is controlling here.

Reversed.

Mr. Justice Douglas concurs in the result.

HUGHES ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR CONTRA COSTA COUNTY.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 61. Argued November 8–9, 1949.—Decided May 8, 1950.

Petitioners demanded of an employer that it hire Negroes at one of its grocery stores, as white clerks quit or were transferred, until the proportion of Negro clerks to white clerks approximated the proportion of Negro to white customers, which was then about 50%. A California state court enjoined petitioners from picketing the employer's stores to enforce this specific demand for selective hiring on a racial basis. For violation of the injunction, petitioners were found guilty of contempt and were sentenced to fine and imprisonment. The policy of California is against discrimination on the basis of color. *Held:* The injunction did not violate petitioners' right of freedom of speech as guaranteed by the Due Process Clause of the Fourteenth Amendment. Pp. 461–469.

1. The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use to compel employment on the basis of racial discrimination contrary to the State's policy. Pp. 463–464.

2. Industrial picketing is something more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Pp. 464–465.

3. The Due Process Clause cannot be construed as precluding California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy. Pp. 465–466.

4. The fact that the policy of the State is expressed by its courts rather than by its legislature is immaterial so far as the Fourteenth Amendment is concerned. Pp. 466–469.

5. A State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so though the forbidden act does not differ in kind from those that are allowed. P. 468.

32 Cal. 2d 850, 198 P. 2d 885, affirmed.

The case is stated in the first three paragraphs of the opinion. The judgment below is *affirmed,* p. 469.

Bertram Edises argued the cause and filed a brief for petitioners.

Frank S. Richards argued the cause for respondent. With him on the brief was *Hugh T. Fullerton.*

Briefs of *amici curiae* supporting petitioners were filed by *Arthur J. Goldberg* for the Congress of Industrial Organizations; *Robert L. Carter* and *Thurgood Marshall* for the National Association for Advancement of Colored People; and *Arthur Garfield Hays* and *Osmond K. Fraenkel* for the American Civil Liberties Union.

Mr. Justice Frankfurter delivered the opinion of the Court.

Does the Fourteenth Amendment of the Constitution bar a State from use of the injunction to prohibit picketing of a place of business solely in order to secure compliance with a demand that its employees be in proportion to the racial origin of its then customers? Such is the broad question of this case.

The petitioners, acting on behalf of a group calling themselves Progressive Citizens of America, demanded of Lucky Stores, Inc., that it hire Negroes at its grocery store near the Canal Housing Project in Richmond, California, as white clerks quit or were transferred, until the proportion of Negro clerks to white clerks approximated the proportion of Negro to white customers. At the time in controversy about 50% of the customers of the Canal store were Negroes. Upon refusal of this demand and in order to compel compliance, the Canal store was systematically patrolled by pickets carrying placards stating that Lucky refused to hire Negro clerks in proportion to Negro customers.

Suit was begun by Lucky to enjoin the picketing on appropriate allegations for equitable relief. The Superior Court of Contra Costa County issued a preliminary injunction restraining petitioners and others from picketing any of Lucky's stores to compel "the selective hiring of negro clerks, such hiring to be based on the proportion of white and negro customers who patronize plaintiff's stores." In the face of this injunction, petitioners continued to picket the Canal store, carrying placards reading: "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize." In conformity with State procedure, petitioners were found guilty of contempt for "wilfully disregarding" the injunction and were sentenced to imprisonment for two days and fined $20 each. They defended their conduct by challenging the injunction as a deprivation of the liberty assured them by the Due Process Clause of the Fourteenth Amendment. The intermediate appellate court annulled the judgment of contempt, 186 P. 2d 756, but it was reinstated on review by the Supreme Court of California. That court held that the conceded purpose of the picketing in this case—to compel the hiring of Negroes in proportion to Negro customers—was unlawful even though pursued in a peaceful manner. Having violated a valid injunction petitioners were properly punishable for contempt. "The controlling points," according to the decision of the Supreme Court of California, "are that the injunction is limited to prohibiting picketing for a specific unlawful purpose and that the evidence justified the trial court in finding that such narrow prohibition was deliberately violated." 32 Cal. 2d 850, 856, 198 P. 2d 885, 888. We brought the case here to consider claims of infringement of the right of freedom of speech as guaranteed by the Due Process Clause of the Fourteenth Amendment. 336 U. S. 966.

First. Discrimination against Negroes in employment has brought a variety of legal issues before this Court in recent years. *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen,* 338 U. S. 232; *Railway Mail Assn.* v. *Corsi,* 326 U. S. 88; *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen,* 323 U. S. 210; *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S. 552. See also Myrdal, An American Dilemma cc. 13–14 (1944). Such discrimination raises sociological problems which in some aspects and within limits have received legal solutions. California has been sensitive to these problems and decisions of its Supreme Court have been hostile to discrimination on the basis of color. *James* v. *Marinship Corp.,* 25 Cal. 2d 721, 155 P. 2d 329; *Williams* v. *International Brotherhood of Boilermakers,* 27 Cal. 2d 586, 165 P. 2d 903. This background of California's legal policy is relevant to the conviction of its court that it would encourage discriminatory hiring to give constitutional protection to petitioners' efforts to subject the opportunity of getting a job to a quota system. The view of that court is best expressed in its own words:

> "It was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned in the Marinship case, *supra* (25 Cal. 2d 721, 737, 745). The fact that those seeking such discrimination do not demand that it be practiced as to all employes of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on mem-

bership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object." 32 Cal. 2d at 856, 198 P. 2d at 889.

These considerations are most pertinent in regard to a population made up of so many diverse groups as ours. To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. States may well believe that such constitutional sheltering would inevitably encourage use of picketing to compel employment on the basis of racial discrimination. In disallowing such picketing States may act under the belief that otherwise community tensions and conflicts would be exacerbated. The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law. The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations.

Second. "[T]he domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states," *Palko* v. *Connecticut,* 302 U. S. 319, 327, no doubt includes liberty of thought and appropriate means for expressing it. But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it

involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." Mr. Justice Douglas, joined by Black and Murphy, JJ., concurring in *Bakery & Pastry Drivers & Helpers Local* v. *Wohl,* 315 U. S. 769, 775, 776. Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. See Gregory, Labor and the Law 346–48 (rev. ed. 1949); Teller, *Picketing and Free Speech,* 56 Harv. L. Rev. 180, 200–02 (1942); Dodd, *Picketing and Free Speech: A Dissent,* 56 Harv. L. Rev. 513, 517 (1943); Hellerstein, *Picketing Legislation and the Courts,* 10 N. C. L. Rev. 158, 186–87, n. 135 (1932).

Third. A State may constitutionally permit picketing despite the ingredients in it that differentiate it from speech in its ordinary context. *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468. And we have found that because of its element of communication picketing under some circumstances finds sanction in the Fourteenth Amendment. *Thornhill* v. *Alabama,* 310 U. S. 88; *American Federation of Labor* v. *Swing,* 312 U. S. 321; *Bakery & Pastry Drivers & Helpers Local* v. *Wohl,* 315 U. S. 769; *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293. However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks

to effectuate gives ground for its disallowance. See *Dorchy* v. *Kansas,* 272 U. S. 306; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U. S. 287; *Hotel and Restaurant Employees' International Alliance* v. *Wisconsin E. R. B.,* 315 U. S. 437; *Carpenters & Joiners Union* v. *Ritter's Cafe,* 315 U. S. 722; *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490. "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual." *Bakery & Pastry Drivers & Helpers Local* v. *Wohl, supra* at 775.

The constitutional boundary line between the competing interests of society involved in the use of picketing cannot be established by general phrases. Picketing when not in numbers that of themselves carry a threat of violence may be a lawful means to a lawful end. See *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 206–07. The California Supreme Court suggested a distinction between picketing to promote discrimination, as here, and picketing against discrimination: "It may be assumed for the purposes of this decision, without deciding, that if such discrimination exists, picketing to protest it would not be for an unlawful objective." 32 Cal. 2d at 855, 198 P. 2d at 888. We cannot construe the Due Process Clause as precluding California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy. See *Giboney* v. *Empire Storage & Ice Co., supra.*

Fourth. The fact that California's policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial.*

*The range of policy in proscribing or permitting picketing for various ends is illustrated by a recent bill against picketing of courts passed by the New York State Legislature but vetoed by Governor Dewey. See N. Y. Times, Apr. 11, 1950, p. 21, col. 1.

Castillo v. *McConnico,* 168 U. S. 674, 684; *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 369; *Skiriotes* v. *Florida,* 313 U. S. 69, 79; *Snowden* v. *Hughes,* 321 U. S. 1, 11. For the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches. *Dreyer* v. *Illinois,* 187 U. S. 71, 83–84; *Soliah* v. *Heskin,* 222 U. S. 522, 524; *Erie R. Co.* v. *Board of Public Util. Comm'rs,* 254 U. S. 394, 413; *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 225; *Keller* v. *Potomac Elec. Power Co.,* 261 U. S. 428, 443. "[R]ights under that amendment turn on the power of the State, no matter by what organ it acts." *Missouri* v. *Dockery,* 191 U. S. 165, 170–71.

It is not for this Court to deny to a State the right, or even to question the desirability, of fitting its law "to a concrete situation through the authority given . . . to its courts." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc., supra* at 297. It is particularly important to bear this in mind in regard to matters affecting industrial relations which, until recently, have "been left largely to judicial lawmaking and not to legislation." *Carpenters & Joiners Union* v. *Ritter's Cafe, supra* at 724. In charging its courts with evolving law instead of formulating policy by statute, California has availed itself of the variety of law-making sources, and has recognized that in our day as in Coke's "the law hath provided several weapons of remedy." Coke, The Compleat Copyholder § 9 in Three Law Tracts (1764). California chose to strike at the discrimination inherent in the quota system by means of the equitable remedy of injunction to protect against unwilling submission to such a system. It is not for this Court to deny to California that choice from among all "the various weapons in the armory of the law." *Tigner* v. *Texas,* 310 U. S. 141, 148.

The policy of a State may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate. Regulation may take the form of legislation, *e. g.*, restraint of trade statutes, or be left to the *ad hoc* judicial process, *e. g.*, common law mode of dealing with restraints of trade. Either method may outlaw an end not in the public interest or merely address itself to the obvious means toward such end. The form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice.

If because of the compulsive features inherent in picketing, beyond the aspect of mere communication as an appeal to reason, a State chooses to enjoin picketing to secure submission to a demand for employment proportional to the racial origin of the then customers of a business, it need not forbid the employer to adopt such a quota system of his own free will. A State is not required to exercise its intervention on the basis of abstract reasoning. The Constitution commands neither logical symmetry nor exhaustion of a principle. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69–70. A State may "direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160. See also *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81; *Keokee Consolidated Coke Co.* v. *Taylor,* 234 U. S. 224, 227; *Miller* v. *Wilson,* 236 U. S. 373, 384; *Farmers & Merchants Bank* v. *Federal Reserve Bank,* 262 U. S. 649, 661–62; *James-Dickinson Farm Mortgage Co.* v. *Harry,* 273 U. S. 119, 125; *Sproles* v. *Binford,* 286 U. S. 374, 396; *Labor Board* v. *Jones &*

Laughlin Steel Corp., 301 U. S. 1, 46. Lawmaking is essentially empirical and tentative, and in adjudication as in legislation the Constitution does not forbid "cautious advance, step by step, and the distrust of generalities." *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411.

The injunction here was drawn to meet what California deemed the evil of picketing to bring about proportional hiring. We do not go beyond the circumstances of the case. Generalizations are treacherous in the application of large constitutional concepts.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE MINTON are of the opinion that this case is controlled by the principles announced in *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, and therefore concur in the Court's judgment.

MR. JUSTICE REED, concurring.

I read the opinion of the Supreme Court of California to hold that the pickets sought from Lucky Stores, Inc., discrimination in favor of persons of the Negro race, a discrimination unlawful under California law. Such picketing may be barred by a State. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC. UNION, LOCAL 309, ET AL. *v.* HANKE ET AL., DOING BUSINESS AS ATLAS AUTO REBUILD.

NO. 309. CERTIORARI TO THE SUPREME COURT OF WASHINGTON.*

Argued February 9, 1950.—Decided May 8, 1950.

A business conducted by the owner himself without employees was peacefully picketed by a labor union to compel compliance with a demand for a union shop. *Held:* A state court injunction against the picketing, challenged as infringing the right of freedom of speech as guaranteed by the Due Process Clause of the Fourteenth Amendment, is affirmed. Pp. 471–474, 481.

33 Wash. 2d 646, 666, 207 P. 2d 206, 216, affirmed.

The State Supreme Court in these two cases sustained permanent injunctions against picketing of places of business. 33 Wash. 2d 646, 666, 207 P. 2d 206, 216. This Court granted certiorari. 338 U. S. 903. *Affirmed,* p. 481.

Samuel B. Bassett argued the cause and filed briefs for petitioners.

J. Will Jones argued the cause for respondents in No. 309. With him on the brief was *Clarence L. Gere.*

C. M. McCune argued the cause for respondent in No. 364. With him on the brief was *Austin E. Griffiths.*

J. Albert Woll, Herbert S. Thatcher and *James A. Glenn* filed a brief for the American Federation of Labor, as *amicus curiae,* supporting petitioners.

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*Together with No. 364, *Automobile Drivers & Demonstrators Local Union No. 882 et al.* v. *Cline,* also on certiorari to the same court, argued February 9–10, 1950.

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE JACKSON and MR. JUSTICE BURTON concurred.

These two cases raise the same issues and are therefore disposed of in a single opinion. The question is this: Does the Fourteenth Amendment of the Constitution bar a State from use of the injunction to prohibit the picketing of a business conducted by the owner himself without employees in order to secure compliance by him with a demand to become a union shop?

In No. 309, respondents A. E. Hanke and his three sons, as copartners, engaged in the business of repairing automobiles, dispensing gasoline and automobile accessories, and selling used automobiles in Seattle. They conducted their entire enterprise themselves, without any employees. At the time the senior Hanke purchased the business in June, 1946, which had theretofore been conducted as a union shop, he became a member of Local 309 of the International Brotherhood of Teamsters, which includes in its membership persons employed and engaged in the gasoline service station business in Seattle. Accordingly, the Hankes continued to display in their show window the union shop card of their predecessor. Local 309 also included the Hankes' business in the list of firms for which it urged patronage in advertisements published in the Washington organ of the International Brotherhood of Teamsters, distributed weekly to members. As a result of the use of the union shop card and these advertisements, the Hankes received union patronage which they otherwise would not have had.

Automobile Drivers and Demonstrators Local 882, closely affiliated with Local 309 and also chartered by the International Brotherhood of Teamsters, includes in its membership persons engaged in the business of selling

used cars and used car salesmen in Seattle. This union negotiated an agreement in 1946 with the Independent Automobile Dealers Association of Seattle, to which the Hankes did not belong, providing that used car lots be closed by 6 p. m. on weekdays and all day on Saturdays, Sundays and eight specified holidays. This agreement was intended to be applicable to 115 used car dealers in Seattle, all except ten of which were self-employers with no employees.

It was the practice of the Hankes to remain open nights, weekends and holidays. In January, 1948, representatives of both Locals called upon the Hankes to urge them to respect the limitation on business hours in the agreement or give up their union shop card. The Hankes refused to consent to abide by the agreement, claiming that it would be impossible to continue in business and do so, and surrendered the union shop card. The name of the Hankes' business was thereafter omitted from the list published by Local 309 in its advertisements.

Soon afterwards the Local sent a single picket to patrol up and down peacefully in front of the Hankes' business between the hours of 8:30 a. m. and 5 p. m., carrying a "sandwich sign" with the words "Union People Look for the Union Shop Card" and a facsimile of the shop card. The picket also wrote down the automobile license numbers of the Hankes' patrons. As a result of the picketing, the Hankes' business fell off heavily and drivers for supply houses refused to deliver parts and other needed materials. The Hankes had to use their own truck to call for the materials necessary to carry on their business.

To restrain this conduct, the Hankes brought suit against Local 309 and its officers. The trial court granted a permanent injunction against the picketing and awarded the Hankes a judgment of $250, the sum stipulated by the parties to be the amount of damage occasioned

by the picketing. The Supreme Court of Washington affirmed. 33 Wash. 2d 646, 207 P. 2d 206.

The background in No. 364 is similar. George E. Cline engaged in the used car business in Seattle, performing himself the services of his business here relevant. He was induced by the threat of picketing to join Automobile Drivers Local 882 in 1946, and in that year he also became a member of the Independent Automobile Dealers Association of Seattle which negotiated with Local 882 the agreement as to business hours to which reference has been made.

In August, 1947, Cline advised Local 882 that he did not intend to continue membership in the union and that he was no longer a member of the Independent Automobile Dealers Association. He announced that he did not consider himself bound by the agreement as to business hours and that he intended to operate on Saturdays. When Cline proceeded to do so Local 882 began to picket his business.

The picketing was conducted peacefully, normally by two pickets who patrolled up and down carrying "sandwich signs" stating that Cline was unfair to the union. The pickets took down the automobile license numbers of Cline's patrons, and when inquiry was made by patrons as to why they were doing so, their reply was: "You'll find out." Because of interference by the pickets with the use of one of Cline's driveways, he was forced to close it to avoid the possibility of one of the pickets being run over. As a result of the picketing, Cline's business fell off and, as in No. 309, drivers for supply houses refused to deliver parts and other needed materials. Cline had to use his own vehicle to call for supplies necessary to carry on the business.

Local 882 reached a new agreement with the Independent Automobile Dealers Association in April, 1948. As a condition to removal of the picket line, the union

demanded that Cline agree to keep his business closed after 1 p. m. on Saturdays and to hire a member of the union as a salesman to be compensated at the rate of seven percent of the gross sales regardless of whether they were made by Cline or this employee. Suit by Cline to restrain patrolling of his business resulted in a permanent injunction against the union and its officers—Cline waived his claim for damages—and the Supreme Court of Washington, relying on its decision in the *Hanke* case, affirmed. 33 Wash. 2d 666, 207 P. 2d 216.

In both these cases we granted certiorari to consider claims of infringement of the right of freedom of speech as guaranteed by the Due Process Clause of the Fourteenth Amendment. 338 U. S. 903.

Here, as in *Hughes* v. *Superior Court, ante,* p. 460, we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is "indeed a hybrid." Freund, On Understanding the Supreme Court 18 (1949). See also Jaffe, *In Defense of the Supreme Court's Picketing Doctrine,* 41 Mich. L. Rev. 1037 (1943). The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and "the power of the State to set the limits of permissible contest open to industrial combatants." *Thornhill* v. *Alabama,* 310 U. S. 88, 104.[1] A State's judgment on striking

[1] It is relevant to note that the Alabama statute held unconstitutional in the *Thornhill* case had been construed by the State courts to prohibit picketing without "exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute." 310 U. S. at 99.

such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect.

These two cases emphasize the nature of a problem that is presented by our duty of sitting in judgment on a State's judgment in striking the balance that has to be struck when a State decides not to keep hands off these industrial contests. Here we have a glaring instance of the interplay of competing social-economic interests and viewpoints. Unions obviously are concerned not to have union standards undermined by non-union shops. This interest penetrates into self-employer shops. On the other hand, some of our profoundest thinkers from Jefferson to Brandeis have stressed the importance to a democratic society of encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power. "There is a widespread belief . . . that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men . . . and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty." Mr. Justice Brandeis, dissenting in *Liggett Co.* v. *Lee,* 288 U. S. 517, 541, 580.

Whether to prefer the union or a self-employer in such a situation, or to seek partial recognition of both interests, and, if so, by what means to secure such accommodation, obviously presents to a State serious problems. There are no sure answers, and the best available solution

is likely to be experimental and tentative, and always subject to the control of the popular will. That the solution of these perplexities is a challenge to wisdom and not a command of the Constitution is the significance of *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468. Senn, a self-employed tile layer who occasionally hired other tile layers to assist him, was picketed when he refused to yield to the union demand that he no longer work himself at his trade. The Wisconsin court found the situation to be within the State's anti-injunction statute and denied relief. In rejecting the claim that the restriction upon Senn's freedom was a denial of his liberty under the Fourteenth Amendment, this Court held that it lay in the domain of policy for Wisconsin to permit the picketing: "Whether it was wise for the State to permit the unions to do so is a question of its public policy—not our concern." 301 U. S. at 481.

This conclusion was based on the Court's recognition that it was Wisconsin, not the Fourteenth Amendment, which put such picketing as a "means of publicity on a par with advertisements in the press." [2] 301 U. S. at 479. If Wisconsin could permit such picketing as a mat-

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[2] The Court said: "In declaring such picketing permissible Wisconsin has put this means of publicity on a par with advertisements in the press." 301 U. S. at 479. To assume that this sentence is to be read as though the picketing was permitted by Wisconsin not as a matter of choice but because the Fourteenth Amendment compelled its allowance is to assume that so careful a writer as Mr. Justice Brandeis, the author of the Court's opinion, meant the above sentence to be read as though it contained the bracketed insertion as follows: "In declaring such picketing permissible Wisconsin [recognized that the Fourteenth Amendment] has put this means of publicity on a par with advertisements in the press." In other words, it is suggested that the bracketed interpolation which Justice Brandeis did not write is to be read into what he did write although thereby its essential meaning would be altered.

ter of policy it must have been equally free as a matter of policy to choose not to permit it and therefore not to "put this means of publicity on a par with advertisements in the press." If Wisconsin could have deemed it wise to withdraw from the union the permission which this Court found outside the ban of the Fourteenth Amendment, such action by Washington cannot be inside that ban.[3]

Washington here concluded that, even though the relief afforded the Hankes and Cline entailed restriction upon communication that the unions sought to convey through picketing, it was more important to safeguard the value which the State placed upon self-employers, leaving all other channels of communication open to the union. The relatively small interest of the unions considerably influenced the balance that was struck. Of 115 used car dealers in Seattle maintaining union standards, all but ten were self-employers with no employees. "From this fact," so we are informed by the Supreme Court of Washington, "the conclusion seems irresistible that the union's interest in the welfare of a mere handful of members (of whose working conditions no complaint at all is made) is far outweighed by the interests of individual proprietors and the people of the community as a whole, to the end that little businessmen and property owners shall be free from dictation as to business policy by an outside group having

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[3] Of course, the true significance of particular phrases in *Senn* appears only when they are examined in their context: "Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The State may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets." 301 U. S. at 478.

but a relatively small and indirect interest in such policy." 33 Wash. 2d at 659, 207 P. 2d at 213.

We are, needless to say, fully aware of the contentious nature of these views. It is not our business even remotely to hint at agreement or disagreement with what has commended itself to the State of Washington, or even to intimate that all the relevant considerations are exposed in the conclusions reached by the Washington court. They seldom are in this field, so deceptive and opaque are the elements of these problems. That is precisely what is meant by recognizing that they are within the domain of a State's public policy. Because there is lack of agreement as to the relevant factors and divergent interpretations of their meaning, as well as differences in assessing what is the short and what is the long view, the clash of fact and opinion should be resolved by the democratic process and not by the judicial sword. Invalidation here would mean denial of power to the Congress as well as to the forty-eight States.

It is not for us to pass judgment on cases not now before us. But when one considers that issues not unlike those that are here have been similarly viewed by other States [4] and by the Congress of the United States,[5] we cannot conclude that Washington, in holding the pick-

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[4] See, *e. g.*, *Bautista* v. *Jones*, 25 Cal. 2d 746, 155 P. 2d 343; *Dinoffria* v. *International Brotherhood of Teamsters and Chauffeurs*, 331 Ill. App. 129, 72 N. E. 2d 635; *Saveall* v. *Demers*, 322 Mass. 70, 76 N. E. 2d 12.

[5] Section 8 (b) (4) (A) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, makes it an unfair labor practice for a union "to engage in . . . a strike . . . where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization." 61 Stat. 141, 29 U. S. C. (Supp. III) § 158 (b) (4) (A). See also § 10 (l) of the National Labor Relations Act, as amended, and § 303 of the Labor Management Relations Act.

eting in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that Washington has offended the Constitution.

We need not repeat the considerations to which we adverted in *Hughes* v. *Superior Court* that make it immaterial, in respect to the constitutional issue before us, that the policy of Washington was expressed by its Supreme Court rather than by its legislature. The Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches. *Dreyer* v. *Illinois,* 187 U. S. 71, 83–84; *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 225. "[R]ights under that amendment turn on the power of the State, no matter by what organ it acts." *Missouri* v. *Dockery,* 191 U. S. 165, 170–71.

Nor does the Fourteenth Amendment require prohibition by Washington also of voluntary acquiescence in the demands of the union in order that it may choose to prohibit the right to secure submission through picketing. In abstaining from interference with such voluntary agreements a State may rely on self-interest. In any event, it is not for this Court to question a State's judgment in regulating only where an evil seems to it most conspicuous.

What was actually decided in *American Federation of Labor* v. *Swing,* 312 U. S. 321, *Bakery & Pastry Drivers & Helpers Local* v. *Wohl,* 315 U. S. 769, and *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293, does not preclude us from upholding Washington's power to make the choice of policy she has here made. In those cases we held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern

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circumstances, to what constitutes an industrial relationship or a labor dispute.[6] See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 30 (1947). The power of a State to declare a policy in favor of self-employers and to make conduct restrictive of self-employment unlawful was not considered in those cases. Indeed in *Wohl* this Court expressly noted that the State courts had not found that the picketing there condemned was for a defined unlawful object. 315 U. S. at 774.

When an injunction of a State court comes before us it comes not as an independent collocation of words. It is defined and confined by the opinion of the State court. The injunctions in these two cases are to be judged here with all the limitations that are infused into their terms by the opinions of the Washington Supreme Court on the basis of which the judgments below come before us. So read, the injunctions are directed solely against picketing for the ends defined by the parties before the Washington court and this Court. To treat the injunctions otherwise—to treat them, that is, outside the scope of the issues which they represent—is to deal with a case that is not here and was not before the Washington court. In considering an injunction against picketing recently, we had occasion to reject a similar claim of infirmity derived not from the record but from unreality. What we then said is pertinent now: "What is before us . . . is not the order as an isolated, self-contained writing but the order with the gloss of the Supreme Court of Wisconsin upon it." *Hotel & Restaurant Employees' International Alliance* v. *Wisconsin E. R. B.*, 315 U. S. 437, 441. Our affirmance of these injunctions is in con-

[6] As to the Court's duty to restrict general expressions in opinions in earlier cases to their specific context, see *Cohens* v. *Virginia*, 6 Wheat. 264, 399–400; *Armour & Co.* v. *Wantock*, 323 U. S. 126, 132–33.

formity with the reading derived from the Washington court's opinions. If astuteness may discover argumentative excess in the scope of the injunctions beyond what we constitutionally justify by this opinion, it will be open to petitioners to raise the matter, which they have not raised here, when the cases on remand reach the Washington court.

Affirmed.

MR. JUSTICE CLARK concurs in the result.

MR. JUSTICE BLACK dissents for substantially the reasons given in his dissent in *Carpenters & Joiners Union* v. *Ritter's Cafe,* 315 U. S. 722, 729–32.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases.

MR. JUSTICE MINTON, with whom MR. JUSTICE REED joins, dissenting.

Petitioners in each of these cases were "permanently restrained and enjoined from in any manner picketing" the places of business of respondents. The picketing here was peaceful publicity, not enmeshed in a pattern of violence as was true in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287; nor was there violence in the picketing, as in *Hotel & Restaurant Employees' International Alliance* v. *Wisconsin E. R. B.,* 315 U. S. 437. The decrees entered in the instant cases were not tailored to meet the evils of threats and intimidation as *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293, 295, indicates they might have been; nor were they limited to restraint of picketing for the purpose of forcing the person picketed to violate the law and public policy of the state, as were the decrees in *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, and *Build-*

ing Service Employees Union v. *Gazzam, post,* p. 532, this day decided. The abuses of picketing involved in the above cases were held by this Court not to be protected by the Fourteenth Amendment from state restraint.

It seems equally clear to me that peaceful picketing which is used properly as an instrument of publicity has been held by this Court in *Thornhill* v. *Alabama,* 310 U. S. 88; *Carlson* v. *California,* 310 U. S. 106; *American Federation of Labor* v. *Swing,* 312 U. S. 321; *Bakery & Pastry Drivers & Helpers Local* v. *Wohl,* 315 U. S. 769; and *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293, to be protected by the Fourteenth Amendment. I do not understand that in the last three mentioned cases this Court, as the majority in its opinion says, "held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute." If the states may set bounds, it is not for this Court to say where they shall be set, unless the setting violates some provision of the Federal Constitution. I understand the above cases to have found violations of the federal constitutional guarantee of freedom of speech, and the picketing could not be restrained because to do so would violate the right of free speech and publicity. This view is plainly stated by this Court in *Cafeteria Employees Union* v. *Angelos,* 320 U. S. at 295:

> "In *Senn* v. *Tile Layers Union,* 301 U. S. 468, this Court ruled that members of a union might, 'without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' 301 U. S. at 478. Later cases applied the *Senn* doctrine by enforcing the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area

of immunity as defined by state policy. *A. F. of L.* v. *Swing,* 312 U. S. 321; *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769."

All the recent cases of this Court upholding picketing, from *Thornhill* to *Angelos,* have done so on the view that "peaceful picketing and truthful publicity" (see 320 U. S. at 295) is protected by the guaranty of free speech. This view stems from Mr. Justice Brandeis' statement in *Senn* that "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." 301 U. S. 468, 478. In that case Justice Brandeis was dealing with action of Wisconsin that *permitted* picketing by a labor union of a one-man shop. Of course, as long as Wisconsin allowed picketing, there was no interference with freedom of expression. By permitting picketing the State was allowing the expression found in "peaceful picketing and truthful publicity." There was in that posture of the case no question of conflict with the right of free speech. But because Wisconsin could permit picketing, and not thereby encroach upon freedom of speech, it does not follow that it could forbid like picketing; for that might involve conflict with the Fourteenth Amendment. It seems to me that Justice Brandeis, foreseeing the problem of the converse, made the statement above quoted in order to indicate that picketing could be protected by the free speech guaranty of the Federal Constitution. Whether or not that is what Justice Brandeis meant, I think this Court has accepted that view, from *Thornhill* to *Angelos.* It seems to me too late now to deny that those cases were rooted in the free speech doctrine. I think we should not decide the instant cases in a manner so alien to the basis of prior decisions.

The outlawing of picketing for all purposes is permitted the State of Washington by the upholding of these broad

decrees. No distinction is made between what is legitimate picketing and what is abusive picketing. "[H]ere we have no attempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket." *Angelos* case, 320 U. S. at 295.

Because the decrees here are not directed at any abuse of picketing but at all picketing, I think to sustain them is contrary to our prior holdings, founded as they are in the doctrine that "peaceful picketing and truthful publicity" is protected by the constitutional guaranty of the right of free speech. I recognize that picketing is more than speech. That is why I think an abuse of picketing may lead to a forfeiture of the protection of free speech. Tested by the philosophy of prior decisions, no such forfeiture is justified here.

I would reverse the judgments in these two cases.

Syllabus.

UNITED STATES *v.* NATIONAL ASSOCIATION OF REAL ESTATE BOARDS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 428. Argued March 31, 1950.—Decided May 8, 1950.

1. That no interstate commerce is involved is not a barrier to a suit to enjoin violations of § 3 of the Sherman Act involving purely local conduct in the District of Columbia, since Congress specifically made § 3 applicable to such conduct and had power to do so under Art. I, § 8, Clause 17 of the Constitution. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427. P. 488.
2. If the business of a real estate broker is "trade" within the meaning of § 3 of the Sherman Act, evidence that the Washington Real Estate Board had adopted standard rates of commissions for its members, that its code of ethics required members to maintain such standard rates, that members agreed to abide by the code, and that the prescribed rates were used in the great majority of transactions, although the Board had invoked no sanctions for departure therefrom, is sufficient to show a price-fixing scheme violative of § 3. Pp. 488–489.

   (a) That such price-fixing may serve a worthy or honorable end is immaterial. P. 489.

   (b) That no penalties were imposed for deviations from the price schedules is immaterial. P. 489.
3. The business of a real estate broker is "trade" within the meaning of § 3 of the Sherman Act. Pp. 489–492.

   (a) The services of real estate brokers cannot be assimilated to those of employees, nor can the present case be compared to those involving the application of the antitrust laws to labor unions—notwithstanding § 6 of the Clayton Act declaring that "the labor of a human being is not a commodity or article of commerce" and exempting labor unions and their members from the antitrust laws. Pp. 489–490.

   (b) The fact that the business of a real estate broker involves the sale of personal services rather than commodities does not take it out of the category of "trade" within the meaning of § 3 of the Sherman Act, which is aimed at the fixing of prices and

other unreasonable restraints in the case of services as well as goods. Pp. 490–491.

(c) The activity of a real estate broker is commercial and carried on for profit; and the competitive standards which the Sherman Act sought to preserve in the field of trade and commerce are as relevant to the brokerage business as to other branches of commercial activity. P. 492.

4. That appellees were acquitted in a criminal prosecution for conspiracy to violate § 3 of the Sherman Act is no bar to this civil suit to enjoin the same conspiracy, since the doctrine of *res judicata* is not applicable. *Helvering* v. *Mitchell,* 303 U. S. 391. Pp. 492–494.

5. The finding of the District Court that the National Association of Real Estate Boards and its executive vice president did not in fact conspire with the Washington Board to fix and prescribe the rates of commission to be charged by members of the latter is sustained, since it was not "clearly erroneous" within the meaning of Rule 52 of the Federal Rules of Civil Procedure. Pp. 494–496.

84 F. Supp. 802, affirmed in part and reversed in part.

In a civil suit in a federal district court to enjoin a conspiracy to fix rates of commissions of real estate brokers in the District of Columbia in violation of § 3 of the Sherman Act, judgment was entered for defendants. 84 F. Supp. 802. On appeal to this Court, *affirmed in part and reversed in part,* p. 496.

The Assistant to the Attorney General Ford and *Victor H. Kramer* argued the cause for the United States. With them on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson, Herbert N. Maletz* and *J. Roger Wollenberg.*

Roger J. Whiteford argued the cause for the National Association of Real Estate Boards et al., appellees. With him on the brief was *John J. Wilson.*

William E. Leahy argued the cause for the Washington Real Estate Board et al., appellees. With him on the brief was *William J. Hughes, Jr.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a civil action brought by the United States to enjoin appellees[1] from engaging in a price-fixing conspiracy in violation of § 3 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 3.[2] The core of the case is the charge that the members of the Washington Real Estate Board combined and conspired to fix the commission rates for their services when acting as brokers in the sale, exchange, lease and management of real property in the District of Columbia.

The same conspiracy was charged in a criminal proceeding.[3] The criminal case was tried first. At the end of the Government's case the court granted the defendants' motion for a judgment of acquittal. 80 F. Supp. 350. Appellees then moved for summary judgment in this civil suit, contending that the judgment of acquittal in the criminal case is *res judicata* here. That motion was denied.[4]

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[1] National Association of Real Estate Boards, a nation-wide incorporated trade association; Herbert U. Nelson, its executive vice-president; Washington Real Estate Board, an incorporated association of real estate brokers in Washington, D. C.; and 15 of its members individually and as representatives of a class consisting of all members of the Washington Board.

[2] "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal."

[3] The indictment was returned against the Washington Real Estate Board and the National Association of Real Estate Boards.

[4] An appeal from that order was dismissed. 85 U. S. App. D. C. 165, 176 F. 2d 631.

The civil case was then tried. It was stipulated that the trial would be on the record in the criminal case, the United States reserving the right to offer additional exhibits. No evidence was offered by appellees. The court entered judgment for the appellees, holding that the agreement to fix the rates of brokerage commissions, which had been shown, was not a violation of the Act. 84 F. Supp. 802. The case is here on appeal. 32 Stat. 823, 62 Stat. 989, 15 U. S. C. § 29.

First. The fact that no interstate commerce is involved is not a barrier to this suit. Section 3 of the Sherman Act [5] is not leveled at interstate activities alone. It also puts beyond the pale certain conduct purely local in character and confined to the District of Columbia. That Congress has the power so to legislate for the District by virtue of Art. I, § 8, Clause 17 of the Constitution and did so by § 3 was settled by *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 432–435.

Second. The Washington Board has adopted standard rates of commissions for its members—charges which cover the wide range of services furnished by a real estate agent. The Board's code of ethics provides that "Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates." Members agree to abide by this code. The prescribed rates are used in the great majority of transactions, although in exceptional situations a lower charge is made. But departure from the prescribed rates has not caused the Washington Board to invoke any sanctions. Hence the District Court called the rate schedules "non-mandatory."

Enough has been said to show that under our decisions an illegal price-fixing scheme has been proved, unless the

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[5] See note 2, *supra.*

fixing of real estate commissions is not included in the prohibitions of § 3 of the Act. Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve. That is the teaching of an unbroken line of decisions. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218 *et seq.*; *United States* v. *Paramount Pictures*, 334 U. S. 131, 142, 143. And the fact that no penalties are imposed for deviations from the price schedules is not material. See *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600, 608–609; *American Column Co.* v. *United States*, 257 U. S. 377, 411; *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52, 62. Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line.

Third. The critical question is whether the business of a real estate agent is included in the word "trade" within the meaning of § 3 of the Act. The District Court thought not. It was of the view that where personal services are involved, a combination to fix the price or compensation is legal. It seemingly was influenced by the declaration in § 6 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 17, that "the labor of a human being is not a commodity or article of commerce . . . nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." But we think it a misconception to assimilate the services involved here to those of employees or to compare the present case to those involving the application of the

antitrust laws to labor unions. Cf. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469; *United States* v. *Hutcheson,* 312 U. S. 219. We do not have here any more than we did in *American Medical Assn.* v. *United States,* 317 U. S. 519, or *United States* v. *Women's Sportswear Mfrs. Assn.,* 336 U. S. 460, cf. *Columbia River Packers Assn.* v. *Hinton,* 315 U. S. 143, an aspect of the employee-employer relationship to which the antitrust laws have made special concessions.

Members of the Washington Board are entrepreneurs. Some are individual proprietors; others are banks or corporations. Some may have no employees; others have large staffs. But each is in business on his own. The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of "trade" within the meaning of § 3 of the Act. The Act was aimed at combinations organized and directed to control of the market by suppression of competition "in the marketing of goods and services." See *Apex Hosiery Co.* v. *Leader, supra,* p. 493.

Justice Story in *The Nymph,* 18 Fed. Cas. 506, while construing the word "trade" in the Coasting and Fishery Act of 1793, 1 Stat. 305, said,

> "The argument for the claimant insists, that 'trade' is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d section. In the first place, the word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions,

> it is constantly called a trade. Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoemaker, though some of these may be, and sometimes are, carried on without buying or selling goods."

It is in that broad sense that "trade" is used in the Sherman Act. That has been the consistent holding of the decisions. The fixing of prices and other unreasonable restraints have been consistently condemned in case of services as well as goods. Transportation services (*United States* v. *Freight Assn.*, 166 U. S. 290, 312; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505), cleaning, dyeing, and renovating wearing apparel (*Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427), the procurement of medical and hospital services (*American Medical Assn.* v. *United States, supra,* 528), the furnishing of news or advertising services (*Farmer's Guide Co.* v. *Prairie Co.*, 293 U. S. 268; *Associated Press* v. *United States,* 326 U. S. 1)—these indicate the range of business activities that have been held to be covered by the Act. In *Atlantic Cleaners & Dyers* v. *United States, supra,* 435, 437, the Court rejected the view that "trade" as used in § 3 should be interpreted in the narrow sense which would exclude personal services. It held, speaking through Mr. Justice Sutherland, that § 3 used the word in the broad sense in which Justice Story used it in *The Nymph, supra.* Chief Justice Groner made an extended analysis and summary of the problem in *United States* v. *American Medical Assn.*, 72 App. D. C. 12, 16–20, 110 F. 2d 703, 707–711, where the Court of Appeals for the District of Columbia held that the practice of medicine in the District was a "trade" within the meaning of § 3 of the Act. Its conclusion was that the term included "all occupations in which men are engaged for a livelihood." We do

not intimate an opinion on the correctness of the application of the term to the professions. We have said enough to indicate we would be contracting the scope of the concept of "trade," as used in the phrase "restraint of trade," in a precedent-breaking manner if we carved out an exemption for real estate brokers. Their activity is commercial and carried on for profit. The fact that no goods are manufactured or bought or sold in the process is as irrelevant here as it was in *Atlantic Cleaners & Dyers* v. *United States, supra.* No reason of policy has been advanced for reading § 3 of the Act less literally than its terms suggest. The competitive standards which the Act sought to preserve in the field of trade and commerce seem as relevant to the brokerage business as to other branches of commercial activity.

Hopkins v. *United States,* 171 U. S. 578, and *Anderson* v. *United States,* 171 U. S. 604, are not opposed to this conclusion. It was held in those cases that commission merchants and yard traders on livestock exchanges were not engaged in interstate commerce even though the livestock moved across state lines (cf. *Stafford* v. *Wallace,* 258 U. S. 495), and therefore that the rules and agreements between the merchants and traders (which included in the *Hopkins* case the fixing of minimum fees) did not fall under the ban of the Sherman Act. But we are not confronted with that problem here. As noted, we are concerned here not with interstate commerce but with trade or commerce in the District of Columbia.

Fourth. Appellees claim that the judgment of acquittal in the criminal action is *res judicata* in this action. *Helvering* v. *Mitchell,* 303 U. S. 391, is *contra* and rules this case. There Mitchell had been tried and acquitted of a criminal charge of wilfully attempting to evade payment of his income tax. Thereafter suit was brought to

collect the taxes owed plus a 50 per cent penalty for fraudulent evasion. The acquittal in the criminal case was held not to be a bar to the collection of the penalty.[6] "The difference in degree of the burden of proof in criminal and civil cases" was held to preclude application of the doctrine of *res judicata* in the civil suit. 303 U. S. 397. In the present case the motions for judgment of acquittal raised the question whether the evidence overcame all reasonable doubt of the guilt of appellees.[7] The ruling on them did not determine whether by the lesser degree of proof required in a civil case appellees might be found to have conspired to fix commissions. The civil action is independent of the criminal cause (*Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 52) and is remedial in nature. It has been repeatedly held that though the civil suit is bottomed on the same facts, it is

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[6] Since the Court ruled that the 50 per cent penalty was not a criminal penalty but a civil administrative sanction (303 U. S. 398–406), the case was considered distinct from *Coffey* v. *United States*, 116 U. S. 436, which held that the facts ascertained in a criminal case as between the United States and the claimant could not be again litigated between them in a civil suit which was punitive in character. The fact that in case of corporations dissolution can result from a civil suit under the antitrust laws does not make the proceeding any the less remedial. The civil suit aims to put an end to the restraint, not to impose punishment for past acts. See *Schine Theatres* v. *United States*, 334 U. S. 110, 128.

[7] The motions apparently were made under Rule 29 of the Federal Rules of Criminal Procedure which provides in part: "MOTION FOR JUDGMENT OF ACQUITTAL. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

not barred by the prior judgment of acquittal in the criminal case. See *Stone* v. *United States,* 167 U. S. 178; *Murphy* v. *United States,* 272 U. S. 630; *Helvering* v. *Mitchell, supra.* The result is not altered by the circumstance that the court in ruling on the sufficiency of the evidence may have started with an erroneous construction of the law.

Fifth. The District Court found that two of the appellees—National Association and Herbert U. Nelson [8]—did not conspire with the Washington Board to fix and prescribe the rates of commission to be charged by the members of the latter. No more particularized findings were made. Appellant asks us to set aside that ruling. The question is whether we may do so in light of Rule 52 of the Federal Rules of Civil Procedure which provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The National Association is a nationwide, incorporated trade association of which the Washington Board is a member. Active members of the Washington Board are also members of the National Association. The National Association has a code of ethics which includes an article stating that "the schedules of fees established by the various Real Estate Boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor." It is provided in the by-laws of the National Association (1) that each member board shall adopt the code of ethics of the National Association as a part of its rules and regulations for violation of which disciplinary action may

[8] See note 1, *supra.*

be taken, and (2) that any member board that neglects or refuses to maintain and enforce the code of ethics with respect to the activities of its constituent members may be expelled from membership in the National Association. The appellant also points to evidence showing the activities of the National Association in developing a national schedule of commissions which, it is alleged, were influential in shaping the fees adopted by the Washington Board in 1944.

Appellant relies chiefly on the code of ethics and by-laws of the National Association, as it clearly may (*Associated Press* v. *United States, supra,* pp. 8, 12), to establish the restraint of trade. But we cannot say that the District Court was "clearly erroneous" in finding that the National Association and Nelson were not laced into the conspiracy to fix the commissions in the District of Columbia. The statement in the code of ethics that the schedule of fees "should be observed" is somewhat ambiguous. It may be advisory only. The provision of the by-laws that violations of the code of ethics of the National Association should be the basis of disciplinary action against both member boards and their constituent members is aimed at thirty-five articles of the code of ethics, not selectively at the fee provision. So we are left somewhat in doubt as to the extent if any to which the National Association and Nelson were architects of the fee-fixing conspiracy or participants in it. At best their relationship to it is, on this record, a somewhat attenuated one.

It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 342; *United States* v. *Gypsum Co.,* 333 U. S. 364, 394–395. We are not given those

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choices, because our mandate is not to set aside findings of fact "unless clearly erroneous."

The judgment of the District Court is reversed except as to the National Association and Nelson; and as to them it is affirmed.

So ordered.

MR. JUSTICE FRANKFURTER and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE JACKSON, dissenting.

If real estate brokerage is to be distinguished from the professions or from other labor that is permitted to organize, the Court does not impart any standards for so doing.

It is certain that those rendering many kinds of service are allowed to combine and fix uniform rates of pay and conditions of service. This is true of all laborers, who may do so within or without unions and whose unions frequently do include owners of establishments that employ others, such as automobile sales agencies. See, for example, *International Brotherhood of Teamsters, etc.* v. *Hanke, ante,* p. 470. I suppose this immunity is not confined to those whose labor is manual, and is not lost because the labor performed is professional. The brokerage which is swept under the antitrust laws by this decision is perhaps a borderline activity. However, the broker furnishes no goods and performs only personal services. Capital assets play no greater part in his service than in that of the lawyer, doctor or office worker. Services of the real estate broker, if not strictly fiduciary, are at least those of a trusted agent and, oftentimes, advisory as to values and procedures. I am not persuaded that fixing uniform fees for the broker's labor is more offensive to the antitrust laws than fixing uniform fees for the labor of a lawyer, a doctor, a carpenter, or a plumber. I would affirm the decision of the court below.

POWELL ET AL. *v.* UNITED STATES CARTRIDGE CO.

NO. 96. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

Argued December 8–9, 1949.—Decided May 8, 1950.

The Fair Labor Standards Act applies to employees of a private contractor operating a Government-owned munitions plant under a cost-plus-a-fixed-fee contract with the Government. Pp. 498–522.

1. Such employees are not employees of the United States within the meaning of the Act. Pp. 504–508.

2. Such employees are engaged in the production of goods for commerce within the meaning of the Act. Pp. 509–515.

(a) The "transportation" of munitions of the United States to destinations outside of the state of their production is "commerce" within the meaning of the Act, even though the munitions were transported for use or consumption and not for sale or exchange. Pp. 511–512.

(b) The munitions produced were "goods" within the meaning of the Act, even though they were produced for delivery into the actual physical possession of the United States as their ultimate consumer. Pp. 512–515.

3. The Fair Labor Standards Act and the Walsh-Healey Act of June 30, 1936, 41 U. S. C. §§ 35 *et seq.*, are not mutually exclusive, but are mutually supplementary. Pp. 515–520.

4. Neither the Act of July 2, 1940, 50 U. S. C. App. §§ 1171, 1172, nor the action of the Secretary of War taken pursuant thereto excludes the applicability of the Fair Labor Standards Act to such employees. Pp. 520–522.

174 F. 2d 718; 174 F. 2d 730; 171 F. 2d 964, reversed.

The facts and proceedings below are stated in the opinion at pp. 499–504. The judgments below are *reversed and the causes remanded*, p. 522.

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*Together with No. 79, *Aaron et al.* v. *Ford, Bacon & Davis, Inc.*, on certiorari to the United States Court of Appeals for the Eighth Circuit; and No. 58, *Creel et al.* v. *Lone Star Defense Corp.*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

Thomas Bond argued the cause and filed a brief for petitioners in No. 96.

By special leave of Court, *Bessie Margolin* argued the cause for the United States, as *amicus curiae,* urging reversal. With her on the brief were *Solicitor General Perlman, Robert L. Stern, William S. Tyson* and *E. Gerald Lamboley.*

June P. Wooten argued the cause for petitioners in No. 79. With him on the brief were *Charles H. Earl, Paul Talley, Wayne W. Owen, Cooper Jacoway* and *Gerland P. Patten.*

Wayne Owen, C. M. Kennedy and *Pat Coon* submitted on brief for petitioners in No. 58.

William L. Marbury argued the cause for respondents.

Robert H. McRoberts argued the cause for respondent in No. 96. *Mr. Marbury* was with him on the brief.

E. L. McHaney, Jr. argued the cause for respondent in No. 79. With him on the brief were *Mr. Marbury, Otto Atchley* and *Mr. McRoberts.*

Otto Atchley argued the cause for respondent in No. 58. *Mr. Marbury* was with him on the brief.

Mr. Justice Burton delivered the opinion of the Court.

The question in each of these cases is whether the Fair Labor Standards Act of 1938, as amended,[1] applies to a person employed by a private contractor at a Government-owned munitions plant operated by the contractor under a cost-plus-a-fixed-fee contract made with the United

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[1] 52 Stat. 1060, *et seq.,* 53 Stat. 1266, 54 Stat. 615–616, 55 Stat. 756, 61 Stat. 87, 63 Stat. 446, 910–920, 29 U. S. C. §§ 201–219, 29 U. S. C. (Supp. III) §§ 201–217.

States. We hold that the Act does apply but we do not reach the question of the validity of the individual claims based upon it.

This issue was argued here in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249. We, however, remanded that case and withheld decision of the issue, awaiting a more solid basis of findings. *Id.* at p. 257. Each of the instant cases presents such a basis.

No. 96 (The Powell Case).

In December, 1940, the United States contracted with The United States Cartridge Company, respondent herein, as "an independent contractor and in no wise an agent of the Government" on a cost-plus-a-fixed-fee basis to operate the Government's St. Louis Ordnance Plant in Missouri.[2] The contract stated that it was authorized by the Act of July 2, 1940.[3] It provided that the respondent would operate the Government's plant for the manufacture of certain types and quantities of small arms ammunition, that the Government would reimburse the

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[2] Congress charged the War and Navy Departments with the operation of about 100 giant Government-owned munitions plants. Those Departments had the option of operating them themselves or through commercial contractors. So as to utilize fully the labor and management resources of the nation and to minimize encroachment upon its industrial structure, both Departments chose the latter course. As to the general war production policies, see *Lichter* v. *United States*, 334 U. S. 742, 767–768. Out of 143 billion dollars of contracts made by the War Department between 1941 and 1946, over 40 billions were cost-plus contracts. Out of 68 billion dollars of Navy contracts, 18 billions were cost-plus contracts. Hearings before Subcommittee of the Senate Committee on the Judiciary on S. No. 70, 80th Cong., 1st Sess. 422–423, 624–626 (1947). The quotation in the text is from the contract in this case, see p. 505, *infra*.

[3] 54 Stat. 712–714, 50 U. S. C. App. §§ 1171, 1172.

respondent for its expenditures in such operation and, in addition, pay the respondent a fixed fee based upon the types and quantities of ammunition it supplied. The title to the site, plant, equipment and, in general, to the raw material, work in progress and finished munitions was to be in the Government.[4] Most of the materials were to be supplied by the Government. The contract provided expressly for the reimbursement of the respondent's expenses for labor. The respondent, in turn, agreed to supply practically all services incident to the setting up of an efficient operating force and to the operation of the plant until the required ammunition had been produced. The respondent was made responsible for storing the materials, supplies and finished ammunition and for loading the ammunition on cars or other carriers in accordance with the Government's instructions. The ammunition generally was shipped by common carrier on Government bills of lading to military destinations outside of Missouri. The Government reserved large rights of supervision, auditing and inspection to be exercised through its "Contracting Officer." The employees, including the petitioners, were to be hired, assigned, directed, supervised, paid and discharged by the respondent.

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[4] Article III–F, ¶ 3 of the contract stated that:

"The title to all work under this contract, completed or in the course of construction or manufacture, and to all the Ammunition manufactured or in the process of being manufactured, shall be in the Government. Likewise, upon delivery at the site of the work, or at an approved storage site, title to all purchased materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Title II hereof, shall vest in the Government. The Government shall bear all risk incident to such ownership. *These provisions as to title being vested in the Government shall not operate however, to relieve the Contractor from any duties imposed upon it under the terms of this contract.*" (Emphasis supplied.)

The contract stated expressly that all persons engaged in the work "shall be subject to the control and constitute employees of the Contractor . . . ." It quoted all of the "representations and stipulations" relating to employment directed by the Walsh-Healey Act.[5] Under it, the contracting officer (subject to a right of appeal) could require the respondent to dismiss any employee whom he deemed incompetent or whose retention "is deemed" not to be in the public interest. The contract made no express reference to the Fair Labor Standards Act. However, in a booklet which was distributed by the respondent, each employee at the St. Louis Ordnance Plant was informed, among other things, that "There will be eight hours in any working day, and forty hours will constitute a working week. . . . When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate *as provided under the Walsh-Healey Act, and the Fair Labor Standards Act.*" (Emphasis supplied.)

The 59 individual petitioners were employed in the safety department of the plant. They alleged that, under the Fair Labor Standards Act, they were entitled to overtime pay which they had not received. They sued in the United States District Court for the Eastern District of Missouri to recover that pay, plus liquidated damages and an attorney's fee. The respondent denied liability on many grounds, including those that the Fair Labor Standards Act did not apply to employees at the St. Louis Ordnance Plant and that, in any event, these petitioners were not entitled to any recovery under that Act. After trial, the District Court entered judgment in favor of the petitioners for the total sum of $246,251.44 (twice the amount of the overtime pay claimed), plus $24,625 as an attorney's

[5] Adopted June 30, 1936, 49 Stat. 2036, *et seq.*, 41 U. S. C. § 35, *et seq.*

fee and costs. The respondent moved for a new trial so that the Portal-to-Portal Act of 1947,[6] which had been adopted five days before the District Court's judgment, might be applied to the issues. The motion was denied and the case was appealed. While the appeal was pending in the United States Court of Appeals for the Eighth Circuit, the decision of this Court in *Kennedy* v. *Silas Mason Co., supra,* was announced. The Court of Appeals thereupon heard a reargument of this case with special reference to the issues raised in the *Silas Mason* case. Sitting *en banc,* it reversed the District Court and held that the Fair Labor Standards Act did not apply to employment at the St. Louis Ordnance Plant. 174 F. 2d 718. All seven judges held that the Walsh-Healey Act applied to such employment to the exclusion of the Fair Labor Standards Act. Four of those judges also joined in an opinion (p. 726) stating that the Act of July 2, 1940, had given discretion to the Secretary of War to determine what overtime regulations should be applicable to Government-owned privately operated plants and that, through his adoption of the Walsh-Healey Act, he had rendered the Fair Labor Standards Act inapplicable under this contract. The Court of Appeals did not reach the merits of the individual claims of the petitioners under the Fair Labor Standards Act. We granted certiorari. 338 U. S. 810.

No. 79 (The Aaron Case).

This case presents substantially the same issue as that in the *Powell* case, but it relates to employees at the Arkansas Ordnance Plant. The issue arises on a summary judgment of the United States District Court for the Eastern District of Arkansas in favor of the respondent, rendered on pleadings, supporting affidavits, admis-

[6] 61 Stat. 84–90, 29 U. S. C. (Supp. III) §§ 216, 251–262.

sions of fact and answers to interrogatories. The plant was operated by the respondent under a cost-plus-a-fixed-fee contract entered into with the United States in July, 1941, and generally comparable, for present purposes, with that in the *Powell* case. The petitioners, 1,278 in number, were handlers, carriers and processors of explosives, who claimed additional compensation under the Fair Labor Standards Act for approximately 35 minutes before, and 30 minutes after, their scheduled work in the plant. The respondent answered and moved for summary judgment on three grounds—that the petitioners were not engaged in the kind of work that is covered by the Fair Labor Standards Act, that they are not within the coverage of the Act because they were employees of the United States, and that, by virtue of the Portal-to-Portal Act of 1947, they are not entitled to recover in any event.

In rendering judgment for the respondent, the District Court adopted its opinion in *Barksdale* v. *Ford, Bacon & Davis,* 70 F. Supp. 690. Without passing on other contentions, it there held that the Fair Labor Standards Act was not applicable because, in processing and assembling munitions under like conditions, the respondent had not been engaged "in the production of goods for commerce" within the meaning of that Act. The Court of Appeals for the Eighth Circuit affirmed, 174 F. 2d 730, on authority of its decision in the *Powell* case, *supra.* We granted certiorari. 337 U. S. 955.

No. 58 (The Creel Case).

This case, from the Fifth Circuit, presents substantially the same issue as do the *Powell* and *Aaron* cases. The issue arises on a summary judgment in favor of the respondent, rendered by the United States District Court for the Eastern District of Texas on pleadings and supporting affidavits. Here the Lone Star Ordnance Plant,

near Texarkana, Texas, was owned by the Government and operated by the respondent under a cost-plus-a-fixed-fee contract entered into with the United States in July, 1941, comparable in its material features to those in the *Powell* and *Aaron* cases. The petitioners, several hundred in number, were employed at the plant in capacities such as those of truck drivers, lift-fork operators, loaders and unloaders. Their services were used in the production of munitions, such as shells, bombs, detonators and other ordnance items. The title to substantially all of the raw material, work in progress and finished products was in the Government. Most of the materials were furnished by the Government and the finished products were shipped in accordance with Government instructions on Government bills of lading to military destinations, usually outside of Texas. The petitioners sued for overtime pay claimed to be due them under the Fair Labor Standards Act. Quoting from the opinion of the District Court in the *Barksdale* case, *supra,* the trial court gave judgment for the respondent. The Court of Appeals for the Fifth Circuit affirmed. 171 F. 2d 964. It stated that the respondent, on the record before it, was an agency of the Government, was not an independent contractor and was not engaged in commerce within the meaning of the Fair Labor Standards Act. We granted certiorari. 337 U. S. 923. We heard this case with the *Powell* and *Aaron* cases.

The United States filed a brief and argued here, as *amicus curiae,* in support of the petitioners on the limited issue now before us.

I. The Petitioners Were Not Employees of the United States Within the Meaning of the Fair Labor Standards Act.

If the petitioners were employees of the United States, the Fair Labor Standards Act excludes them from its

coverage.[7] A similar defense is presented through the claim that the respondents were not independent contractors but were agencies of the United States, representing and binding the United States as their principal in the employment of petitioners.

In each contract, there was a provision comparable to the following quoted from the contract in the *Powell* case:

> "Article I–E—Authority of the Contractor.
>
> "In carrying out the work under this Title I the Contractor is authorized to do all things necessary or convenient in and about the operating and closing down of the Plant, or any part thereof, including (but not limited to) *the employment of all persons engaged in the work hereunder, (who shall be subject to the control and constitute employees of the Contractor)*, ..." (Emphasis supplied.)

Each contract is replete with references to the persons employed as the "employees of the Contractor" or "persons employed by the Contractor."

The contract in the *Powell* case contained the following additional clause:

> "Article III–A—Status of Contractor.
>
> "It is expressly understood and agreed by the Contractor and the Government that in the performance of the work provided for in this contract, *the Contractor is an independent contractor and in no wise an agent of the Government.*" (Emphasis supplied.)

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[7] "SEC. 3. As used in this Act—

. . . . .

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but *shall not include the United States* or any State or political subdivision of a State, ...

"(e) 'Employee' includes any individual employed by an employer." (Emphasis supplied.) 52 Stat. 1060, 29 U. S. C. § 203 (d) and (e).

Such provisions are persuasive that the petitioners should be recognized here as employees of the respective respondents and the respondents as independent contractors. The respondents argue, however, that the context of the times, other provisions of the contracts and the practice under the contracts deprive these statements of their ordinary meaning. We find, on the contrary, that each of these sources supplies additional evidence that these provisions correctly state the true relationship between the petitioners and respondents.

For example, we find in these contracts a reflection of the fundamental policy of the Government to refrain, as much as possible, from doing its own manufacturing and to use, as much as possible (in the production of munitions), the experience in mass production and the genius for organization that had made American industry outstanding in the world.[8] The essence of this policy called for private, rather than public, operation of war production plants. This purpose shines through the following clause in the contract in the *Powell* case:

> "Whereas, The Government *desires to have the Contractor, as an independent contractor on a cost-plus-a-fixed-fee basis, make all necessary preparations for the operation of said plant, including the training of operating personnel* . . . but excluding the procurement and supervision of the installation of manufacturing facilities [to be done, under a like contract, by the contractor's parent corporation, Western Cartridge Company]; *and operate said plant;* . . . ." (Emphasis supplied.)

It would have been simple for the Government to have ordered all of this production to be done under gov-

[8] For a review of the development of the war production program and its reliance on private industry, see *Lichter* v. *United States*, 334 U. S. 742, 758–766.

ernmental operation as well as under governmental ownership. To do so, however, might have weakened our system of free enterprise. We relied upon that system as the foundation of the general industrial supremacy upon which ultimate victory might depend. In this light, the Government deliberately sought to insure private operation of its new munitions plants.

In these great projects built for and owned by the Government, it was almost inevitable that the new equipment and materials would be supplied largely by the Government and that the products would be owned and used by the Government. It was essential that the Government supervise closely the expenditures made and the specifications and standards established by it. These incidents of the program did not, however, prevent the placing of managerial responsibility upon independent contractors.

The relationship of employee and employer between the worker and the contractor appears not only in the express terminology that has been quoted. It appears in the substantial obligation of the respondent-contractors to train their working forces, make job assignments, fix salaries, meet payrolls, comply with state workmen's compensation laws and Social Security requirements and "to do all things necessary or convenient in and about the operating and closing down of the Plant, ..." [9]

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[9] If the workers were employees of the United States, state workmen's compensation laws and other comparable laws would be inapplicable. In the St. Louis and Arkansas Ordnance plants the contractor, in order to explain the relationships being established, issued a booklet to each new employee. The manual thus used at the St. Louis plant is entitled "Your Job with the St. Louis Ordnance Plant." It opens with the statement "Every prospective *employee of United States Cartridge Company* should read this booklet describing the Company's policy and procedure." (Emphasis supplied.) It describes the relationship between the United States Government, the company and "Our Employees." For example, it says "The Com-

The insertion in each of these contracts of the representations and specifications that are set forth in the Walsh-Healey Act was, in itself, a recognition by the Secretary of War of the independent contractor status of the respondents.

The petitioner-employees and the Government expressly disavow, in their briefs, any employment relationship between them. The managerial duties imposed upon the respondents were the duties of employers. That such duties be performed by private contractors was a vital part of the Government's general production policy. In the light of these considerations, we conclude that the respective respondents, in form and in substance, were the employers of these petitioners within the meaning of the Fair Labor Standards Act.[10]

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pany . . . is responsible to the United States Government for ammunition production, to the City of St. Louis in maintaining a successful civic enterprise, and to our employees, for the establishment of working conditions conducive to the health and happiness of each man and woman employed in the plant." It explains the financial basis of its cost-plus contract of management as follows: "In the final analysis, your wages come from the United States Government, whose only source of income is taxes collected from you and all other citizens. The United States Cartridge Company is merely managing the plant for the Federal Government." It adds that "When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided under the Walsh-Healey Aet, and the Fair Labor Standards Act."

[10] See the dissenting opinion of Circuit Judge Hutcheson in *Kennedy* v. *Silas Mason Co.*, 164 F. 2d 1016, 1019–1920 (C. A. 5th Cir.), the reasoning of which is in accord with our decision: "Here the whole elaborate system was designed and operated so that the United States should not be the employer." *Id.* at p. 1020. Cf. *Curry* v. *United States*, 314 U. S. 14, and *Alabama* v. *King & Boozer*, 314 U. S. 1. Those cases held that the contractors, under Government cost-plus-a-fixed-fee contracts, were, as such, subject to state use taxes and state sales taxes.

II. Petitioners Were Engaged in the Production of Goods for Commerce Within the Meaning of the Fair Labor Standards Act.

Before discussing the definitions assigned by the Act to the words "commerce" and "goods," it is helpful to examine the Act as a whole in the light of the time of its adoption. It was adopted in 1938, during an industrial depression. It expressly stated its purposes.[11] This Court has further expounded them.[12] In this Act, the

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[11] "Sec. 2. (a) *The Congress hereby finds that the existence, in industries engaged* in commerce or *in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers* (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) *leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;* and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." (Emphasis supplied.) 52 Stat. 1060, 29 U. S. C. § 202.

[12] While one major means of spreading substandard labor conditions was recognized to be through the lowering of prices for goods produced under substandard conditions, there has been no attempt in the Act, or in this Court's discussion of the Act, to limit its coverage to employees engaged in producing goods solely for competitive markets. An announced purpose of the Act was to raise living standards and to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . ." (§ 2 (a), see note 11, *supra.*) That purpose was concerned directly with any widespread existence of substandard wages, hours or working conditions. That such conditions could be reached by Congress through its regulation of inter-

primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation. It sought to raise living standards without substantially curtailing employment or earning power.

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state transportation of the products of those conditions had been forcefully stated in the dissent of Mr. Justice Holmes in *Hammer* v. *Dagenhart*, 247 U. S. 251, 277–281. In 1941, this Court expressly approved that reasoning and upheld the constitutionality of the Fair Labor Standards Act. *United States* v. *Darby*, 312 U. S. 100, 115–117. The language of Mr. Justice Stone in speaking for the Court in that case is significant. It extended to interstate shipments and transportation of proscribed products in general:

"While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. . . . It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, *Lottery Case, supra* [188 U. S. 321]; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; cf. *Hoke* v. *United States, supra* [227 U. S. 308]; stolen articles, *Brooks* v. *United States*, 267 U. S. 432; kidnapped persons, *Gooch* v. *United States*, 297 U. S. 124, and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334.

. . . . . .

"Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, . . . we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

. . . . . .

"The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it." *United States* v. *Darby, supra*, at pp. 113, 115, 117.

For further legislative history of the Act, see *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 668–669, n. 5.

Roland Electrical Co. v. *Walling,* 326 U. S. 657, 669–670. The Government's munitions plants provided an appropriate place for the beneficial application of the Act's standards of working conditions without danger of reduced employment through loss of business. This Act would fail materially in its purpose if it did not reach the producers of the tremendous volume of wartime goods destined for interstate transportation. In 1941–1945 the manufacture of munitions was a major source of employment. Wages and hours in that industry were a major factor in fixing the living standards of American labor.

A. *The "transportation" of munitions of the United States to destinations outside of the state of their production is "commerce" within the meaning of the Act.* The Act applies to "employees . . . engaged in commerce or in the production of goods for commerce." [13] The precise question here is whether the munitions were produced for "commerce" when such production was for transportation outside of the state and for use by the United States in the prosecution of war, but not for sale or exchange.

Section 3 (b) of the Act contains the following definition of "commerce":

> "(b) 'Commerce' means trade, commerce, *transportation,* transmission, or communication among the several States or *from any State to any place outside thereof.*" (Emphasis supplied.) 52 Stat. 1060, 29 U. S. C. § 203 (b).

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[13] "SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce [certain minimum wages] . . . .

"SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce [longer than certain maximum hours] . . . ." 52 Stat. 1062, 1063, 29 U. S. C. §§ 206 (a) and 207 (a).

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This definition is an exercise by Congress of its constitutional power "To regulate Commerce with foreign Nations, and among the several States, ..." U. S. Const. Art. I, § 8, Cl. 3. Such power has been held repeatedly to include the power to regulate interstate shipments or transportation as such, and not merely to regulate shipments or transportation of articles that are intended for sale, exchange or other trading activities.[14]

Congress could have expressly exempted from the Act employees engaged in producing goods for interstate transportation not leading to a sale or exchange. Congress also could have exempted employees engaged in producing munitions for use by the United States in war, rather than for sale or exchange by it. Congress might even have exempted all employees producing goods in any Government-owned plants. However, Congress stated no such exemptions. On the contrary, Congress included, by express definition of terms, employees engaged in the production of goods for interstate *transportation.*

In view of these considerations, we find no merit in an interpretation of the Act which would exclude from its coverage those employees who were engaged in the production of munitions for interstate transportation for use or consumption, as distinguished from transportation of them for sale or exchange.

B. *The munitions produced were "goods" within the meaning of the Fair Labor Standards Act.* The respondents argue that, even though the munitions were produced for commerce, they were not "goods" within the meaning of the Act. Section 3 (i) defines "Goods" as follows:

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[14] *E. g., Edwards* v. *California,* 314 U. S. 160; *Gooch* v. *United States,* 297 U. S. 124; *Thornton* v. *United States,* 271 U. S. 414; *Brooks* v. *United States,* 267 U. S. 432; *United States* v. *Hill,* 248 U. S. 420; *Caminetti* v. *United States,* 242 U. S. 470. See also, *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, 549; *Bell* v. *Porter,* 159 F. 2d 117, 118–119 (C. A. 7th Cir.).

> "(i) 'Goods' means goods (including ships and marine equipment), wares, *products,* commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but *does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof* other than a producer, manufacturer, or processor thereof." (Emphasis supplied.) 52 Stat. 1061, 29 U. S. C. § 203 (i).

Respondents claim that this language excludes the petitioners from the coverage of the Act because the petitioners were engaged in producing munitions which thereafter, and prior to their interstate transportation, were to be delivered to the United States as the ultimate consumer. This interpretation would deprive the original jurisdictional fact—that at the time the munitions were produced they were intended for interstate transportation—of its covering effect merely because those munitions, upon a later delivery to the United States, would then cease to be "goods" within the meaning of the Act.

We believe that the crucial fact which establishes the coverage of the Act is the status of the munitions, as "goods," during the time they were being produced. The literal meaning of the exclusionary clause in § 3 (i), and that which best serves the purposes of the Act, is merely that, after the products shall have been delivered into the actual physical possession of their ultimate consumer, they then shall cease to be "goods." This retains the important effect that, thereafter, it is not a violation of § 15 (a) (1)[15] for the ultimate consumer to transport the

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[15] "SEC. 15. (a) . . . it shall be *unlawful for any person*—

"(1) *to transport,* offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, *any goods* in the

products outside of the state. This interpretation was adopted by the Wage and Hour Administrator. 1940 WH Man. 131, 133. It was readopted without change in the July, 1947, revision of the Administrator's Interpretations. 12 Fed. Reg. 4585, 29 C. F. R. § 776.7 (h).[16]

We hold, therefore, that the fact that the munitions were produced for delivery, into the actual physical pos-

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production of which any employee was employed in violation of section 6 [minimum wages] or section 7 [maximum hours], ...

. . . . . .

"SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. . . ." (Emphasis supplied.) 52 Stat. 1068, 1069, 29 U. S. C. §§ 215 (a) (1) and 216 (a).

[16] "Irrespective of the question as to who is the ultimate consumer, however, it is our opinion that the employees of the container manufacturer are subject to the act. The fact that products lose their character as 'goods' when they come into the actual physical possession of the ultimate consumer does not affect the coverage of the act as far as the employees producing the products are concerned. The facts at the time that the products are being produced determine whether an employee is engaged in the production of goods for commerce, and at the time of the production of the containers they were clearly 'goods' within the meaning of the statute since they were not, at that point of time, in the actual physical possession of the ultimate consumer. All that the term 'goods' quoted above is intended to accomplish is to protect ultimate consumers, other than producers, manufacturers, or processors of the goods in question from the 'hot goods' provision of section 15 (a) (1). This seems clear from the language of the statute. . . . But Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the act by making delivery within the State into the actual physical possession of the ultimate consumer who transports or ships the goods outside the State. Thus, it is our opinion that employees engaged in building a boat for delivery to the purchaser at the boatyard are within the coverage of the act if the employer, at the time the boat is being built, intends, hopes, or has reason to believe that the purchaser will sail it outside the State." 29 C. F. R. § 776.7 (h).

session of the United States as their ultimate consumer, before their subsequent interstate shipment, does not deprive the employees who produced the munitions of the benefits of the Fair Labor Standards Act. It is not material whether such interstate transportation was to take place before or after the delivery of the munitions to the United States. In either event, the employees were engaged in the production of "goods" for "commerce." To hold otherwise would restrict the Act not only arbitrarily but also inconsistently with its broad purposes.

III. The Walsh-Healey Act and the Fair Labor Standards Act Are Not Mutually Exclusive.

The Walsh-Healey Act was adopted about one year after the National Industrial Recovery Act[17] had been declared unconstitutional. *Schechter Corp.* v. *United States,* 295 U. S. 495. Seeking then to regulate wages and hours of employees, the Walsh-Healey Act kept within a narrow field of assured constitutionality. It prescribed that, in Government contracts for the manufacture or furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000, the contractor pay its employees not less than the minimum wages determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work in the locality. It prescribed also that no such employees be permitted to work in excess of eight hours in any one day or in excess of 40 hours in any one week,[18]

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[17] 48 Stat. 195.

[18] This clause was amended in 1942 by adding the following: "*Provided,* That the provisions of this subsection [c] shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an Act entitled 'Fair Labor Standards Act

that no male person under 16 years of age, no female person under 18 years of age and no convict labor be employed by the contractor, and that no part of the contract be performed or any of the material, supplies, articles or equipment be manufactured or fabricated under working conditions unsanitary, hazardous or dangerous to the health and safety of the employees.

The Fair Labor Standards Act of 1938 was passed nearly two years later by the next Congress. It presented a different and broader approach. It was not restricted to public contracts. The sponsor of the bill stated that it was intended to carry out the suggestions made by the President in his message to Congress. 81 Cong. Rec. 4960, 4961 (1937). In that message, the President said:

> ". . . to protect the fundamental interests of free labor and a free people we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade."

The Act declared its purposes in bold and sweeping terms.[19] Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality amply broad enough to include employees of private con-

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of 1938'." 56 Stat. 277, 41 U. S. C. § 35 (c). Those paragraphs relate to collective bargaining agreements covering 26 or 52 consecutive workweeks and exempting the employer making them from charges of violation of the usual maximum hour provisions of the Fair Labor Standards Act. This amendment thus recognized the application of the Fair Labor Standards Act to employment to which the Walsh-Healey Act also applied.

[19] See note 11, *supra*.

tractors working on public projects as well as on private projects. Where exceptions were made, they were narrow and specific. It included as employees "any individual employed by an employer" (§ 3 (e)), and defined an employer so as amply to cover an individual or corporation employing persons on public contracts, while expressly excluding, *as an employer,* "the United States or any State or political subdivision of a State, . . ." (§ 3 (a) and (d)). It devoted § 13 to listing *exemptions of specific classes of employees.* For example, it exempted any seaman, any employee of a carrier by air subject to Title II of the Railway Labor Act and any employee employed in agriculture. It exempted certain employees under § 204 of the Motor Carrier Act, 1935,[20] but limited their exemption to the maximum hour provisions in § 7. It also exempted any employee of an employer subject to Part I of the Interstate Commerce Act. Such specificity in stating exemptions strengthens the implication that employees not thus exempted, such as employees of private contractors under public contracts, remain within the Act.

The Act includes the following affirmative statement as to the relation of its provisions to other laws:

"RELATION TO OTHER LAWS

"SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify non-

[20] See *Pyramid Motor Corp.* v. *Ispass,* 330 U. S. 695; *Levinson* v. *Spector Motor Service,* 330 U. S. 649; *Southland Gasoline Co.* v. *Bayley,* 319 U. S. 44; *Overnight Motor Co.* v. *Missel,* 316 U. S. 572; *United States* v. *American Trucking Assns.,* 310 U. S. 534.

> compliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act." 52 Stat. 1069, 29 U. S. C. § 218.

The above language discloses a congressional awareness that the coverage of the Fair Labor Standards Act overlaps that of other federal legislation affecting labor standards. In other enactments we find collateral recognition that the Walsh-Healey Act might apply to the same employment as the Fair Labor Standards Act. An amendment to the Walsh-Healey Act, in 1942, recognized this possibility.[21] Similarly, the Portal-to-Portal Act of 1947 indicated that persons employed by Government contractors, and thus protected by the Walsh-Healey Act, were entitled to the benefits of the Fair Labor Standards Act.[22]

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[21] See note 18, *supra*.

[22] "SECTION 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, . . . (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and *the Public Treasury would be seriously affected by consequent increased cost of war contracts;* . . . .

. . . . . .

"The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and

Despite evidence that the two statutes define overlapping areas, respondents contend that they should be construed as being mutually exclusive. There has been no presentation of instances, however, where compliance with one Act makes it impossible to comply with the other. There has been no demonstration of the impossibility of determining, in each instance, the respective wage requirements under each Act and then applying the higher requirement as satisfying both.

The Government has presented, as a considered analysis of the overlapping effects of these Acts, excerpts from the Manual of Instructions for the Administration of Contracts (War Department, Office of the Chief of Ordnance, 1941). These are published in the appendix to the brief of the United States. Their forthright treatment and detailed suggested solutions of the practical aspects of the supplementary use of the two Acts are impressive.

In some, and probably most, instances, the "prevailing minimum wages" required by the Walsh-Healey Act were more advantageous to employees than the minimum wages prescribed by the Fair Labor Standards Act at the times here under review.[23] On the other hand, the remedial procedure under the later Act was generally more advantageous to employees than the procedure under the earlier Act.

We conclude that the Acts are not mutually exclusive. The applicability of the Walsh-Healey Act to the con-

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Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act." (Emphasis supplied.) 61 Stat. 84–85, 29 U. S. C. (Supp. III) § 251 (a).

[23] The 1949 amendments to the Fair Labor Standards Act, including especially the increase of minimum wages from 40 cents to 75 cents an hour, demonstrate, however, the growing importance of the application of the Fair Labor Standards Act. 63 Stat. 446, 910–920, 29 U. S. C. (Supp. III) § 202, *et seq.*, especially § 206 (a) (1).

tracts before us therefore does not preclude the application of the Fair Labor Standards Act to employees under the same contracts. We find the Acts to be mutually supplementary.

IV. Neither the Act of July 2, 1940, nor the Action of the Secretary of War Taken Pursuant to it Excludes the Applicability of the Fair Labor Standards Act.

We find in the Act of July 2, 1940,[24] no such recognition of the uniqueness of War Department contracts for the private operation of Government-owned munitions plants as is claimed in the concurring opinion below in the *Powell* case.[25] Without more specific provisions than this Act contains, we cannot interpret it as excluding, or as granting, authority to executive officers to exclude, employees in such plants from the benefits of the general wage and hour provisions which Congress has established in the Walsh-Healey Act and more fully and recently in the Fair Labor Standards Act.

The purposes of this temporary Act of 1940 were the clarification of the contract-making authority of the War Department under existing general law, with such exceptions as were expressly noted, the elimination of certain hazards, and the making of additional grants of emergency authority to the President. For example, this Act referred expressly to the Walsh-Healey Act as applicable to the new War Department contracts when entered into with or without advertising. This was helpful because, when the Walsh-Healey Act was adopted, the contracts to which it applied did not include contracts negotiated without advertising for competitive bids. Similarly, the 1940 Act expressly suspended certain specific limitations on the War Department, *e. g.*, requirements of the congressional

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[24] 54 Stat. 712–714, 50 U. S. C. App. §§ 1171, 1172.

[25] 174 F. 2d 718, 726–730.

approval of estimates and the making of appropriations prior to undertaking construction of certain buildings (§ 1 (a)), restrictions on leasing (§ 1 (b)), restrictions on the assignment of personnel (§ 2 (b)), limitations on the number of serviceable aircraft (§ 3), and restrictions as to civil service employees (§ 4 (a)). No suggestion was made of a suspension of part or all of the Fair Labor Standards Act, nor was anything authorized that would violate that Act.

The single reference made in the 1940 Act to the Walsh-Healey Act was to insure the applicability of the latter Act to negotiated contracts. This appears from the following revealing statement made on the floor of the Senate by Senator Wagner, the author of the amendment containing the reference:

> "A question has arisen—*and the amendment is simply to remove the ambiguity*—as to whether the Walsh-Healey Act, which is now definitely applicable to a contract for the purchase of supplies as a result of advertising, will also apply to a negotiated contract. . . .
>
> ". . . Unless this amendment is adopted we would have this anomalous situation: Under a contract entered into with the Government as the result of public bidding one set of minimum wages, that is, the prevailing wages [under the Walsh-Healey Act], would be applied, whereas under another contract entered into as a result of negotiations, *a much lower minimum wage would be paid, that is, the flat minimum under the Wage and Hour Act* [the Fair Labor Standards Act]. This situation would present an opportunity for exploitation, since a contractor under a negotiated contract might be paying wages in some instances 25 percent to 75 percent below those required under the Healey-Walsh Act. I am sure that we would not want to invite any such exploitation." (Emphasis supplied.) 86 Cong. Rec. 7924 (1940).

See also, 86 Cong. Rec. 7839–7843, and H. R. Rep. No. 2685, 76th Cong., 3d Sess. 1 (1940).

We have considered the other contentions of the respondents, including the weight to be given to the Statement of Labor Policy issued by the War and Navy Departments in 1942,[26] but we do not find in them a convincing refutation of the foregoing conclusions. We, accordingly, find that the Fair Labor Standards Act of 1938, as amended, is applicable to the issues presented in each of the instant cases. We do not reach the validity of the individual claims of the petitioners made in reliance upon that Act.

In No. 96, *Powell et al.* v. *The United States Cartridge Company,* the judgment of the Court of Appeals is reversed and the cause is remanded to that court for further consideration of the errors asserted on appeal but not reviewed by that court.

In No. 79, *Aaron et al.* v. *Ford, Bacon and Davis,* and in No. 58, *Creel* v. *Lone Star Defense Corporation,* the judgments of the respective Courts of Appeals are reversed and the causes are remanded to the respective District Courts for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of any of these cases.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, dissenting.

These cases do not present just another one of those situations in the long series in which the Court has been

[26] This Statement of Labor Policy was emphasized by counsel for the respondent in the *Aaron* case. Much of it is published in Regulations—Army: Ordnance Procurement Instructions, 2 CCH War Law Serv. §§ 9,101.1, 9,104.3, 9,104.4, 9,105.2 and 9,105.3.

called upon to give a sympathetic construction to the Fair Labor Standards Act. We do not here have a controversy involving relations between a capitalist employer and his employees. The real controversy is between the Department of the Army which conceived, formulated, and administered a scheme for the production of war matériel by means of Government-owned plants and the Wage and Hour Division of the Department of Labor which administers the Fair Labor Standards Act. We do not have here, in short, the resistance of private employers to the demands of their employees. Here a vast claim on the Treasury of the United States is in issue. The issue should be decided in light of the fact that Congress has manifested in the most emphatic way that the Fair Labor Standards Act is not to be stretched to the extent that sophistical argumentation can stretch its scope but is to be applied in a commonsensical way.[1] Fine distinctions in the application of the statute can hardly be avoided. That makes it all the more necessary to hew close to the line marked out by the specific facts of the cases before us. The caution that general propositions do not decide concrete cases is particularly to be heeded in dealing with an enactment framed in terms of legal categories having diverse and conflicting contents. It begs the real question to purport to solve a particular problem merely by invoking such a category.

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[1] Congress found that the construction which this Court placed upon the Fair Labor Standards Act in *Jewell Ridge Coal Corp.* v. *Local No. 6167,* 325 U. S. 161, *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, *Bay Ridge Operating Co.* v. *Aaron,* 334 U. S. 446, *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697, and *Farmers Reservoir and Irrigation Co.* v. *McComb,* 337 U. S. 755, misconceived the purposes of Congress. See Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. (Supp. III) § 251 *et seq.;* Act of July 20, 1949, 63 Stat. 446, 29 U. S. C. (Supp. III) § 207 (e) (1), (2), (f); Fair Labor Standards Amendments of 1949, §§ 11, 14, 63 Stat. 910, 917, 919, 29 U. S. C. (Supp. III) §§ 213, 216.

Not only is it important to be heedful of what these cases are really about; it is no less important to be mindful of what they are not about. The problem before us is not the applicability of the Fair Labor Standards Act to work done under all Government contracts, or even to work under all varieties of war production contracts, cost-plus-fixed-fee or otherwise. What is involved is the particular kind of cost-plus-fixed-fee contracts for the operation of ordnance plants under the Act of July 2, 1940, which authorized the Secretary of War to provide for the operation of such plants "through the agency of selected qualified commercial manufacturers." [2] 54 Stat. 713, 50 U. S. C. App. § 1171 (b).

An analysis of the nature of the interrelationship of Government, contractor and employees is necessary to put the issues in their proper perspective. The facts are substantially the same in all three cases, but since the findings in No. 79, *Aaron* v. *Ford, Bacon & Davis, Inc.*, are particularly detailed, further discussion will center on that case.

The United States contracted with respondent Ford, Bacon & Davis, Inc. in July, 1941, for the operation of the Government-owned Arkansas Ordnance Plant and production there of munitions for war—detonators, percussion elements, artillery primers, fuses, boosters and powder train fuses. The plant was a military reservation under the immediate control of an ordnance officer designated by the Chief of Ordnance. Munition quotas and specifications were set by the Government, and inspection by Government officials at each stage of production checked compliance with rules promulgated by the Government not merely as to safety but as to production

[2] The Secretary of the Navy was authorized to enter into contracts for private operation of Navy installations on a cost-plus-fixed-fee basis by §§ 2 (a) and 8 (b) of the Act of June 28, 1940. 54 Stat. 677, 680, 50 U. S. C. App. §§ 1152 (a) (1), 1158 (b).

as well. The contract was terminable at will by the Government and under it the "normal factors which go to make up commercial profit are lacking." War and Navy Departments' Statement of Labor Policy Governing Government-Owned, Privately Operated Plants (1942), digested in 2 CCH War Law Serv. ¶24,862 *et seq.* The United States owned all materials and equipment used in connection with the operation of the plant. Ninety-five per cent were furnished by the Government directly; the remainder was obtained by the contractor after approval by the Government. The United States obtained title to the latter purchases at the point of origin, and shipment to the plant was on Government bills of lading at a reduced rate and without payment of transportation tax. Title to all materials, equipment, and work in process in the plant was at all times in the United States. Finished products were shipped out of Arkansas to military facilities on Government bills of lading.

Under the contract the Government paid all expenses of operating the plant, including labor costs. The contractor was even allowed costs of production of munitions that did not meet specifications and could not be used. The Government contracted for electric power, telephone, teletype and telegraph services itself and paid the bills directly, and provided employees traveling on business with tax-free transportation tickets. At no time did the contractor have to advance its own money—expenses were paid out of available Government funds. For its services in operating the plant, the contractor was paid a fixed fee.

The War and Navy Departments' Statement of Labor Policy forbade agreements between the contractor and personnel "which, in the opinion of either the Secretary of War or the Secretary of the Navy, will have the effect of restricting or hampering maximum output." Although the contract provided that the contractor was to hire all employees and that they were to be "subject to

the control and constitute employees of the Contractor," the Government retained the right to approve or disapprove the employment of all personnel and could require the dismissal of any employee deemed "incompetent or whose retention is deemed to be not in the public interest." No key employee could be assigned to service until the Contracting Officer approved a statement submitted to him on the employee's previous and proposed salary, qualifications and experience. All wage and salary rates and other changes in status were subject to Government approval, and the Government audited in advance of payment all time cards and payrolls and witnessed the actual payment to employees. The requirement of approval of wage rates was neither a dead letter nor a formality. Proposed wage scales were in fact rejected by the War Department.

Work under the contract was specifically made subject to the Walsh-Healey Act, 49 Stat. 2036, 41 U. S. C. § 35 *et seq.* This statute was enacted by Congress after the National Industrial Recovery Act was invalidated, with a view to directing "Government purchases along lines tending to maintain the advance in wages and purchasing power achieved under the N. R. A." S. Rep. No. 1157, 74th Cong., 1st Sess. 1 (1935). See also S. Rep. No. 1193, 74th Cong., 1st Sess. (1935); H. R. Rep. No. 2946, 74th Cong., 2d Sess. (1936). To that end, § 1 (b) requires that employees of Government contractors be paid not less than the "prevailing minimum wage for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished." Provision is also made, *inter alia,* for maximum hours, with overtime permitted at "not less than one and one-half times the basic hourly rate." Pursuant to § 2 of the statute the contract made the contractor liable to the

United States for any underpayment of wages for the benefit of underpaid employees.[3]

Two years after the Walsh-Healey Act became law, Congress by the Fair Labor Standards Act of 1938 fixed specific minimum hourly wages and maximum hours for employees "engaged in commerce or in the production of goods for commerce." 52 Stat. 1062, 1063, 29 U. S. C. §§ 206, 207. Section 16 (b) of that Act gives employees a right of action against their employer for unpaid minimum wages or overtime compensation and for "an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

The Court now holds that the Fair Labor Standards Act is applicable to employees of cost-plus-fixed-fee contractors irrespective of the ultimate liability of the United States under the contracts for whatever sums are recovered in these suits. As we said in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 254, the contractor "in a sense, is no more than a nominal defendant, for it is entitled to reimbursement from the Government." The reach of the liability which today's decision establishes is indicated by the agreed statement that in the *Aaron* case alone, a "conservative estimate of the total amount in suit, exclusive of liquidated damages and costs, is in excess of

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[3] Section 2 provides: "Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract . . . may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees . . . on whose account such sums were withheld or recovered."

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$500,000.00." It was estimated by the Secretary of War in 1946 that the amount at stake in "existing suits and potential suits . . . may in the aggregate exceed $250,000,000, substantially all of which will be reimbursable to the contractors." [4] The Court creates such a drain on the Treasury by imputing to the Congress which enacted the Fair Labor Standards Act—and which of course could not possibly have foreseen the cost-plus-fixed-fee arrangements involved here—the intention, in effect, to open the Treasury not only to huge claims for overtime but in addition to demands for like amounts as "liquidated damages," and attorneys' fees. In the absence of a shred of evidence to indicate that Congress contemplated such a result or would have countenanced it, I cannot bring myself to attribute to Congress the desire to place such a double burden upon the fisc.

Certainly such a result should have a more salient justification than abstract argumentation about words not having fixed scope or function. Our decisions have made one thing clear about the Fair Labor Standards Act: its applicability is not fixed by labels that parties may attach to their relationship nor by common law categories nor by classifications under other statutes. *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722; *Walling* v. *Portland Terminal Co.,* 330 U. S. 148, 150; *McComb* v. *McKay,* 164 F. 2d 40; cf. *United States* v. *United Mine Workers,* 330 U. S. 258, 285–86. Unless we are to disregard this guidance of wisdom in construing so dynamic a code as the Fair Labor Standards Act, designation in the contracts of the contractors as the "employers"

[4] Under the Fair Labor Standards Act even employers who acted with the utmost good faith are liable for liquidated damages and attorneys' fees in addition to unpaid minimum wages or overtime compensation. The severe impact a large, unforeseen nonreimbursed liability would have upon a fixed-fee contractor receiving an annual fee of $420,000 as in the *Aaron* case is manifest.

of the personnel in the ordnance plants cannot be decisive. Again, the bare words of the definitions in that Act, never self-applying in particular cases, are especially inconclusive here because the cost-plus-fixed-fee arrangements adopted for the operation of these plants were of such an unprecedented character. We are dealing with economic arrangements which in their scope and incidence were aptly characterized by the War and Navy Departments' Statement of Labor Policy: "The industrial units thus created are unique." In such unique situations especially we should heed our admonition against perverting "the process of interpretation by mechanically applying definitions in unintended contexts." *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U. S. 755, 764. In law as elsewhere words of many-hued meanings derive their scope from the use to which they are put.

No doubt, as suggested, the purpose of the Fair Labor Standards Act should guide our reading of it. The aim of the Act, set forth in § 2 (a), is to eliminate "in industries engaged in commerce or in the production of goods for commerce . . . labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." But to find that this Act does not fit the contracts in suit neither negatives congressional concern for the welfare of the employees involved nor deprives them of protection consonant with the humane motives underlying the Act. The Walsh-Healey Act itself serves as proof of congressional provision for civilized standards for employees carrying out Government contracts. Pursuant to that statute, the policy under the contracts here was to pay time and one-half for overtime to employees in nonsupervisory classifications. The degree of control exerted by the Government over working conditions and wage rates, Government audit of time cards and payrolls, the presence of Government officers at the time employees

were paid, and the power of the Government to withhold payments otherwise due the contractor or to sue for departure from specified standards and use the recovery to compensate aggrieved employees furnished a scheme of safeguards to assure fair dealing.

It is said that the Fair Labor Standards Act has been interpreted administratively as covering the employees in these cases. But the agency of Government charged with the formulation and supervision of these contracts, the Department of the Army, supports the position of the contractors here. Correspondence between the War and Navy Departments and the Attorney General in 1944 shows that initial reluctance of the two Departments to have suits against cost-plus-fixed-fee contractors under the Fair Labor Standards Act defended on the basis of the inapplicability of the statute did not stem from lack of conviction about the validity of the defense. Rather, the War and Navy Departments feared that its successful assertion would have significant implications for the construction of the National Labor Relations Act and would "result in an impairment of the jurisdiction of the National Labor Relations Board over war plants or cause a substantial legal doubt to be cast upon such jurisdiction." This fear was engendered by the unresourceful advice of a Government lawyer as to the subjection of the employment under these contracts to the collective-bargaining policy of the Wagner Act if the Fair Labor Standards Act was not applicable. In view of such advice, the War and Navy Departments concluded that the interest in efficient prosecution of the war would best be served by preserving at war plants the degree of supervision over labor relations embodied in the National Labor Relations Act even at the expense of abandoning attacks upon the applicability of the Fair Labor Standards Act to cost-plus-fixed-fee contractors. See also 22 Comp. Gen. 277. To find "administrative interpretation" in a decision of Gov-

ernment departments, acting under legal advice, that a concession as to a statute's applicability was an expedient step in the war production program is to disregard the justification for utilizing "administrative interpretation" as a gloss on ambiguous legislation.

The Government exerted close supervision over every phase of operations at these ordnance plants, specifying articles to be manufactured, production quotas and methods of production. Government control was particularly dominant with respect to personnel policies, including phases of hiring and firing, job assignments, working conditions, wage rates, and overtime compensation. The investment in plant and facilities was entirely the Government's, and the Government bore all the expenditures and all the risks of operation. As between the contractors and the workers, the operation was wanting in the characteristic aspects of the normal employer-employee relation. In view of these factors and the applicability of the Walsh-Healey Act with its protective features for plant personnel, I see no basis for attributing to Congress the intention to make these contractors "employers" within the meaning of the Fair Labor Standards Act when such a result would have fiscal consequences neither foreseen nor, on any reasonable assumption, desired by Congress. Cf. *United States* v. *Wittek,* 337 U. S. 346. Since the United States is not an "employer" within the meaning of the statute, the overtime provisions are inapplicable.

These considerations call for affirmance without discussion of other grounds which have been advanced for sustaining the judgments below, some of which at least have commended themselves to several Courts of Appeals.

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 262, ET AL. *v.* GAZZAM.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 449. Argued February 9, 1950.—Decided May 8, 1950.

In a state whose public policy is that employers shall not coerce their employees' choice of a bargaining representative, a state court injunction against peaceful picketing by a labor union for the particular purpose of compelling an employer to sign a contract which would coerce his employees' choice of a bargaining representative does not violate the right of free speech guaranteed by the First and Fourteenth Amendments of the Federal Constitution. Pp. 533–541.

(a) Since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action than the message the pickets convey, this Court upholds a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. Pp. 536–537.

(b) The picketing of the employer to compel him to coerce his employees' choice of a bargaining representative was unlawful because it was an attempt to induce a transgression of the State's policy against such coercion of employees. Pp. 538–539.

(c) *American Federation of Labor* v. *Swing*, 312 U. S. 321, distinguished; *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, followed. Pp. 539–540.

34 Wash. 2d 38, 207 P. 2d 699, affirmed.

Petitioners were enjoined by a state court from picketing respondent's place of business. The State Supreme Court affirmed. 34 Wash. 2d 38, 207 P. 2d 699. This Court granted certiorari. 338 U. S. 903. *Affirmed*, p. 541.

Daniel D. Carmell and *Walter F. Dodd* argued the cause and filed a brief for petitioners.

Alfred J. Schweppe argued the cause and filed a brief for respondent.

MR. JUSTICE MINTON delivered the opinion of the Court.

It is the public policy of the State of Washington that employers shall not coerce their employees' choice of representatives for purposes of collective bargaining. Do the First and Fourteenth Amendments to the Federal Constitution permit the State, in reliance on this policy, to enjoin peaceful picketing carried on for the purpose of compelling an employer to sign a contract with a labor union which coerces his employees' choice of bargaining representative?

The State answered in the affirmative. An injunction was issued in narrow terms enjoining petitioners "from endeavoring to compel plaintiff to coerce his employees to join the defendant union or to designate defendant union as their representative for collective bargaining, by picketing the hotel premises of plaintiff . . . ." The Supreme Court of Washington affirmed, 34 Wash. 2d 38, 207 P. 2d 699, and we granted certiorari. 338 U. S. 903.

At the time of the controversy, respondent employed about fifteen persons at Enetai Inn, a small hotel which he operates in Bremerton, Washington. Just prior to May 1, 1946, representatives of the petitioner union called upon respondent about organizing his employees and asked him to sign a contract with the union which would require his employees to join the union. None of the employees was a member of any union active in the area. Respondent replied that that was a matter for the employees to decide. He gave the union and its representatives permission freely to visit and solicit his employees for membership while he was absent on a brief trip to Los Angeles. Upon his return, the union representatives again approached him about signing a contract. The representatives admitted that they had not

secured any members among the employees, and respondent again replied that it was a matter for the employees. On May 2, 1946, respondent was advised that the union proposed to have the Enetai Inn placed on the "We Do Not Patronize" list, and a meeting for the purpose of attempting to reach a settlement was suggested. At the meeting held a few days later respondent was represented by his attorney. The union still insisted that respondent sign the contract, and respondent through his attorney still declined to sign on the ground that that would require him to coerce his employees to join a union, contrary to state law.

The union asked for and was granted a meeting with respondent's employees at which the union representatives might present their case. Six representatives of organized labor attended this meeting, held on May 10, 1946. Eleven of the employees attended. One was a bellboy whose work the union apparently did not wish to have covered. Respondent was again represented by his attorney. The union representatives were given complete and unhampered opportunity to present their arguments for unionization to the employees. No statement was made by anyone on behalf of respondent or the employees. After the union representatives had completed their presentation, all withdrew except the employees who then took a vote as to whether they wished to join the union. Of the eleven voting, nine voted against joining, one was undecided, and the bellboy, whose membership the union did not desire, voted to join. The result was immediately reported to the union representatives and to respondent's attorney. Several days later respondent was notified that his hotel had been placed on the "We Do Not Patronize" list and pickets began walking in front of his hotel bearing a sign reading: "Enetai Inn—Unfair to Organized Labor." The picket-

ing was carried on by a single picket at a time and was intermittent and peaceful.

With the exception of refusing to sign the contract requiring his employees to join the union, respondent had complied with all of the requests and demands of the union. That single refusal was what caused the union to brand respondent's place of business as unfair. After the picketing started, respondent's attorney agreed to talk to respondent again to see if he would consider signing the contract. After consulting with respondent, the attorney wrote the union's attorney that respondent was willing to negotiate further with the union but would not sign the type of contract that had been tendered him. The union then offered a contract which provided that present employees should not be required to join the union as a condition of continued employment, but that any employees hired in the future would be required to join within fifteen days or be discharged. The new contract also provided that the union should be the bargaining representative for both union and nonunion employees. The second contract was just the first contract in slow motion. Respondent refused to sign it for the same reason he had refused to sign the previously tendered contract.

The peaceful picketing continued, and on June 29, 1946, respondent filed this suit for an injunction and damages. On the first hearing the trial court granted petitioners' motion for a nonsuit and dismissed the complaint. The Supreme Court of Washington reversed on appeal. 29 Wash. 2d 488, 188 P. 2d 97. Upon remand the trial court on September 20, 1948, entered judgment for respondent for damages for the "wrongful picketing" in the sum of $500 and permanently enjoined petitioners in the previously quoted language. This judgment the Supreme Court of Washington affirmed on July 1, 1949, by a divided court. 34 Wash. 2d 38, 207 P. 2d 699.

The State of Washington has what is sometimes referred to as a "Little Norris-LaGuardia Act," [1] which provides that no injunction shall issue in a "labor dispute," as defined in the Act, except in conformity with the provisions of the Act; nor shall any injunction issue contrary to the public policy declared in the Act. No "labor dispute" as determined by the law of Washington was held to exist in this case. There was no injunction against picketing generally. It was held that the objective of the picketing was violative of the public policy against employer coercion of employees' choice of bargaining representative, and that the picketing should be enjoined on that narrow ground.[2]

Does the injunction, limited as it is to restraining petitioners from picketing respondent's hotel for the purpose of compelling him to coerce his employees' choice of bargaining representative, constitute an abridgment of the right of free speech under the First and Fourteenth Amendments?

This Court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Con-

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[1] Washington Labor Disputes Act, Rem. Rev. Stat. (Supp. 1940) § 7612. Certain sections of this Act were held unconstitutional by the Washington Court in *Blanchard* v. *Golden Age Brewing Company*, 188 Wash. 396, 63 P. 2d 397.

[2] The Washington Supreme Court reviewed its decisions in this field in its first opinion in the instant case. *O'Neil* v. *Building Service Employees Union*, 9 Wash. 2d 507, 115 P. 2d 662, and *S & W Fine Foods* v. *Retail Delivery Drivers and Salesmen's Union*, 11 Wash. 2d 262, 118 P. 2d 962, had treated any peaceful picketing as lawful. *American Federation of Labor* v. *Swing*, 312 U. S. 321, was held to be controlling in both cases. But in the instant case, both the *O'Neil* and *S & W* cases were characterized as wrong in principle and were expressly overruled. The court quoted from *Swenson* v. *Seattle Central Labor Council*, 27 Wash. 2d 193, 206, 177 P. 2d 873, 880, where it was said that peaceful picketing is an exercise of the right of free speech which loses the protection of constitutional guaranty where "it steps over the line from persuasion to coercion."

stitution. *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293; *Bakery & Pastry Drivers & Helpers Local* v. *Wohl,* 315 U. S. 769; *American Federation of Labor* v. *Swing,* 312 U. S. 321; *Carlson* v. *California,* 310 U. S. 106; *Thornhill* v. *Alabama,* 310 U. S. 88; *Senn* v. *Tile Layers Union,* 301 U. S. 468. But since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. Thus in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, the picketing in issue, considered in isolation, was peaceful, but had been found to be enmeshed with and set in such a background of violence that it was a part of a pattern of violence. This Court held that peaceful picketing under such circumstances might properly be enjoined by the State.

In *Hotel & Restaurant Employees' International Alliance* v. *Wisconsin E. R. B.,* 315 U. S. 437, this Court upheld the right of Wisconsin through its Employment Relations Board to issue a cease and desist order against violence in picketing and boycotting by the union involved. *Carpenters & Joiners Union* v. *Ritter's Cafe,* 315 U. S. 722, upheld a decree enjoining the union from picketing a cafe having no business connection with the place where the industrial dispute centered. And in *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, the Court sustained a decree enjoining picketing which was peaceful and informative but was carried on for the purpose of coercing the employer to violate the antitrust law of Missouri.

The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. "Primarily it is for the lawmakers to determine

the public policy of the State." *Twin City Pipe Line Company* v. *Harding Glass Company,* 283 U. S. 353, 357.

The State of Washington has by legislative enactment declared its public policy on the subject of organization of workers for bargaining purposes. The pertinent part of this statute is set forth in the margin.[3] The meaning and effect of this declaration of policy is found in its application by the highest court of the State to the concrete facts of the instant case. Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference, or restraint of *employers of labor* in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice

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[3] "In the interpretation of this act and in determining the jurisdiction and authority of the courts of the State of Washington, as such jurisdiction and authority are herein defined and limited, the public policy of the State of Washington is hereby declared as follows:

"Whereas, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the State of Washington are hereby enacted." Rem. Rev. Stat. (Supp. 1940) § 7612-2.

of a bargaining representative is an attempt to induce a transgression of this policy, and the State here restrained the advocates of such transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment.

Petitioners insist that the *Swing* case, *supra,* is controlling. We think not. In that case this Court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative. Peaceful picketing for any lawful purpose is not prohibited by the decree under review. The State has not here, as in *Swing,* relied on the absence of an employer-employee relationship. Thus the State has not, as was the case there, excluded "workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." 312 U. S. at 326.

The Washington statute has not been construed by the Washington courts in this case to prohibit picketing of workers by other workers. The construction of the statute which we are reviewing only prohibits coercion of workers by employers. We cannot agree with petitioners' reading of this injunction that "whatever types of picketing were to be carried out by the union would be in violation of the decree." Respondent does not contend that picketing *per se* has been enjoined but only that picketing which has as its purpose violation of the policy of the State. There is no contention that picketing

directed at employees for organization purposes would be violative of that policy. The decree does not have that effect.

We are of the opinion that *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, controls the disposition of this case, and that it therefore must be affirmed. In the *Giboney* case it is true that the state law which made the objective of the picketing unlawful had criminal sanctions. The Washington statute here has no criminal sanctions. Petitioners seek to distinguish *Giboney* on that ground. This Court there said: "But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. . . . And it is clear that appellants were doing more than exercising a right of free speech or press. . . . They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade." 336 U. S. at 502–503. It is not the presence of criminal sanctions which makes a state policy "important public law." Much public policy does not readily lend itself to accompanying criminal sanctions. Whether to impose criminal sanctions in connection with a given policy is itself a question of policy.

Here, as in *Giboney,* the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the State. That state policy guarantees workers free choice of representatives for bargaining purposes. If respondent had complied with petitioners' demands and had signed one of the tendered contracts and lived up to its terms, he would have thereby coerced his employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative.

The public policy of Washington relied upon by the courts below to sustain this injunction is an important and widely accepted one. The broad purpose of the Act from which this policy flows was to prevent unreasonable judicial interference with legitimate objectives of workers. But abuse by workers or organizations of workers of the declared public policy of such an Act is no more to be condoned than violation of prohibitions against judicial interference with certain activities of workers. We therefore find no unwarranted restraint of picketing here. The injunction granted was tailored to prevent a specific violation of an important state law. The decree was limited to the wrong being perpetrated, namely, "an abusive exercise of the right to picket." *Cafeteria Employees Union* v. *Angelos,* 320 U. S. at 295. The judgment is

Affirmed.

MR. JUSTICE BLACK is of the opinion that this case is controlled by the principles announced in *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, and therefore concurs in the Court's judgment.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

CAPITOL GREYHOUND LINES ET AL. *v.* BRICE, COMMISSIONER OF MOTOR VEHICLES.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 118. Argued December 5, 1949.—Decided May 15, 1950.

Section 25A of Art. 66½ of Maryland Annotated Code (1947 Cum. Supp.) imposes a tax of 2% of the fair market value of motor vehicles as a condition precedent to the issuance of certificates of title thereto and to the operation of the vehicles over Maryland roads. This tax is applied indiscriminately to interstate and intrastate common carriers transporting passengers over Maryland roads and the proceeds are used wholly for road purposes. For the privilege of using its roads Maryland also charges common carriers a mileage tax for each passenger seat of 1/30 of a cent per mile traveled on Maryland roads. *Held:*

1. As applied generally to interstate carriers transporting passengers over Maryland roads, the title tax of 2% of fair market value does not violate the Commerce Clause of the Federal Constitution. Pp. 543–548.

(a) Such a tax must be judged by its result, not by its formula, and must stand unless proven to be in excess of fair compensation for the privilege of using the roads. Pp. 544–547.

(b) The title tax is not invalid on the ground that it varies for each carrier without relation to road use. Pp. 545–546.

(c) If a new rule prohibiting taxes on interstate carriers measured by vehicle value is to be declared, it should be declared by Congress, not by this Court. Pp. 547–548.

2. The record in this case is insufficient to invalidate the tax, as applied to appellants, on the ground that the taxes actually levied are in excess of a fair compensation for the privilege of using Maryland roads. P. 548.

— Md. —, 64 A. 2d 284, affirmed.

The case is stated in the first two paragraphs of the opinion. The judgment below is *affirmed,* p. 548.

Clarence W. Miles argued the cause for appellants. With him on the brief was *Benjamin C. Howard.*

Hall Hammond, Attorney General of Maryland, argued the cause for appellee. With him on the brief was *Ward B. Coe, Jr.,* Assistant Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

The basic question presented is whether one of two Maryland taxes imposed on all common carriers transporting passengers over Maryland roads can be exacted from interstate carriers consistently with the commerce clause of the Federal Constitution. A subsidiary contention impliedly raised by carrier appellants here is that the tax is invalid as applied to them. The Supreme Court of Maryland upheld the tax, — Md. —, 64 A. 2d 284. The case is here on appeal under 28 U. S. C. § 1257 (2).

The tax challenged by appellants is prescribed by § 25A of Art. 66½ of the Annotated Code of Maryland, 1947 Cum. Supp. In the language of appellants that section imposes "a tax of 2% upon the fair market value of motor vehicles used in interstate commerce as a condition precedent to the issuance of certificates of title thereto (the issuance of such certificates being a further condition precedent to the registration and operation of such vehicles in the State of Maryland) . . . ."[1]

First. Appellants do not contend that as interstate carriers they are wholly exempt from state taxation. This Court and others have consistently upheld taxes on inter-

[1] Maryland also imposes a tax for each passenger seat of one-thirtieth of a cent per mile traveled on Maryland roads. Maryland Ann. Code (1947 Cum. Supp.), Art. 81, § 218. Prior to 1947 the mileage tax applied both to interstate and intrastate carriers; the 2% "titling tax" here challenged applied to intrastate carriers only. At that time the state legislature made significant changes. It made the titling tax applicable to interstate as well as to intrastate carriers and reduced the seat-mile tax from one-eighteenth cent to one-thirtieth cent. Chapters 560 and 326, 1947 Laws of the General Assembly of Maryland.

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state carriers to compensate a state fairly for the privilege of using its roads or for the cost of administering state traffic regulations.[2] Courts have invoked the commerce clause to invalidate state taxes on interstate carriers only upon finding that: (1) the tax discriminated against interstate commerce in favor of intrastate commerce; (2) the tax was imposed on the privilege of doing an interstate business as distinguished from a tax exacting contributions for road construction and maintenance or for administration of road laws; or (3) the amount of the tax exceeded fair compensation to the state.[3] This Maryland tax applies to interstate and intrastate commerce without discrimination. The tax proceeds are used by Maryland wholly for road purposes, and the State Supreme Court held that the tax was imposed for the privilege of road use. And neither in the Maryland courts nor here have appellants specifically charged that the amount of taxes imposed on carriers will always be in excess of fair compensation. Their challenge is leveled against the formula, not the amount.

The taxes upheld have taken many forms. Examples are taxes based on mileage, chassis weight, tonnage-capacity, or horsepower, singly or in combination—a list which does not begin to exhaust the innumerable factors bearing on the fairness of compensation by each carrier to a state.[4] The difficulty in gearing taxes to these factors was recognized by this Court as early as *Kane* v. *New Jersey*, 242 U. S. 160, 168, where it said that so long as fees are reasonable in amount "it is clearly within the discretion of the State to determine whether the compen-

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[2] See cases collected in Notes, 75 L. Ed. 953 and 92 L. Ed. 109.

[3] *Sprout* v. *South Bend*, 277 U. S. 163; *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183; *Ingels* v. *Morf*, 300 U. S. 290. And see case collections cited in note 2, *supra*.

[4] For examples of the many factors on which taxes have been hinged, see Note, 92 L. Ed. 109, 119–123.

sation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semi-annually, or by a toll based on mileage or otherwise." [5] Later, in rejecting contentions that the validity of taxes must be determined by formula rather than result, the Court held that a flat fee on the privilege of using state highways "is not a forbidden burden on interstate commerce" unless "unreasonable in amount." *Morf* v. *Bingaman,* 298 U. S. 407, 412. See also *Aero Transit Co.* v. *Comm'rs,* 332 U. S. 495, and annotation thereto, 92 L. Ed. 109, 119–120. Yet clearly a flat fee is not geared to mileage, weight or any other factor relevant in considering the fairness of compensation for road use. Thus, unless we are to depart from prior decisions, the Maryland tax based on the cost of the vehicles should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted.

Appellants, however, in effect urge that we make an exception to the general rule and strike down this tax formula regardless of whether the amount of the tax is within the limits of fair compensation. No tax precisely like this has previously been before us. Appellants argue that a tax on vehicle value should be forbidden by the commerce clause because it varies for each carrier without relation to road use. In support of this contention, they point to the facts shown in this record. Each of the appellant carriers, according to admitted al-

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[5] This statement was made in a case where flat license fees were based on a vehicle's rated horsepower. In that case the person held liable for the state tax was a nonresident driving through the state. By citation of this case we do not mean to imply that the constitutional rule relating to a state's power to collect for the use of its roads by occasional travelers is as broad as where road use by carriers is involved. See *Aero Transit Co.* v. *Comm'rs,* 332 U. S. 495, 503. See also the opinions in *Edwards* v. *California,* 314 U. S. 160.

legations, bought a new passenger-carrying vehicle and declared a purpose to use its vehicle on one of its Maryland routes. The Maryland portions of these three routes are 9, 41 and 64 miles respectively. The state taxes computed on the fair market value of each vehicle are $505.17, $580 and $372.55, respectively. This showing does indicate that the title tax falls short of achieving uniformity among carriers in relation to road use. Moreover, as argued, it may well be unwise to subject carriers to the monetary temptation incident to the application of a tax that hits a carrier only when it purchases a bus. But that is not our issue. And it should be noted that the total charge of Maryland for the privilege of using its roads will not show the same disparity among carriers. For Maryland also charges a mileage tax,[6] and this tax added to the title tax is what Maryland actually charges for its road privileges. Thus the total charge as among carriers does vary substantially with the mileage traveled.

We recognize that in the absence of congressional action this Court has prescribed the rules which determine the power of states to tax interstate traffic, and therefore should alter these rules if necessary to protect interstate commerce from obstructive barriers. But with full appreciation of congenital infirmities of the Maryland formula—and indeed of any formula in this field—as well as of our present rules to test its validity, we are by no means sure that the remedy suggested by appellants would not bring about greater ills. Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with "rough approximation rather than precision." *Harvester Co.* v. *Evatt,* 329 U. S. 416, 422–423. Each additional factor adds to administrative bur-

[6] See note 1, *supra.*

dens of enforcement,[7] which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285, 289. Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads.

Our adherence to existing rules does not mean that any group of carriers is remediless if the total Maryland taxes are out of line with fair compensation due to Maryland. Under the rules we have previously prescribed, such carriers may challenge the taxes as applied, and upon proper proof obtain a judicial declaration of their invalidity as applied. *Ingels* v. *Morf,* 300 U. S. 290. *Cf. Clark* v. *Paul Gray, Inc.,* 306 U. S. 583.

If a new rule prohibiting taxes measured by vehicle value is to be declared, we think Congress should do it.[8]

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[7] One example of the complexities springing from state attempts to weigh numerous factors was the Indiana tax upheld in *Eavey Co.* v. *Department of Treasury,* 216 Ind. 255, 264, 24 N. E. 2d 268, 272, which was ". . . based upon the carrying capacity, number of wheels per axle, load per axle, size of tires used, weight, and other elements described in the act, all of which bear a direct relation to the hazards of the highways."

[8] Congress has passed comprehensive legislation regulating interstate carriers in which it is declared that "Nothing in this chapter shall be construed to affect the powers of taxation of the several States . . . ." 49 U. S. C. § 302 (b). See *Brashear Freight Lines* v. *Public Serv. Comm'n,* 23 F. Supp. 865; see also *Maurer* v. *Hamilton,* 309 U. S. 598. It is interesting to note that the Interstate Commerce Commission charged with the duty of fixing rates and administering the Motor Carrier Act requires carriers to keep accounts showing the "cost of all taxes, licenses and fees assessed for the privilege of operating revenue vehicles over the highways, such as registration fees, license plate fees, . . . certificates of title fees . . . and similar items . . . ." 49 CFR, 1947 Supp., § 182.5220.

We decline to hold that this Maryland title tax law is wholly invalid however applied.

Second. Little need be said as to the faint contention here that the taxes actually levied against appellants are in excess of a fair compensation for the privilege of using Maryland roads. While the State Supreme Court did pass on this question, holding that appellants had failed to prove excessiveness, the assignments of error here did not specifically mention such a challenge. That court satisfactorily disposed of any question of the size of the fees in relationship to the road privileges granted. The burden of proof in this respect is on a carrier who challenges a state law. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 598–600. We agree with the Supreme Court of Maryland that here there is a complete and utter lack of proof sufficient to invalidate the state law on this ground. See *Dixie Ohio Co.* v. *Commission*, 306 U. S. 72, 77–78.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, dissenting.

Once more we are called upon to subject a State tax on interstate motor traffic to the scrutiny which the Commerce Clause requires so that interstate commerce may enjoy freedom from State taxation outside of those narrow limits within which States are free to burden such commerce.

The essential facts are easily stated. By various provisions of Maryland law, an interstate motor carrier may not operate its vehicles within the State until it has registered them. As a prerequisite to registration the car-

rier must obtain a certificate of title for each vehicle. Section 25A of Article 66½ of the Annotated Code of Maryland, 1947 Cum. Supp., imposes a so-called titling tax of 2% of the "fair market value" of each motor vehicle "for the issuance of every original certificate of title . . . and . . . every subsequent certificate of title . . . in the case of sales or resales . . . ." [1] Thus, the tax does not strike at periodic intervals but only when a purchase has been made of a motor vehicle which is to be operated in whole or part on Maryland highways, whether the vehicle be new or old. The entire proceeds of the tax are devoted to road purposes.

Appellants operate interstate bus lines, in part over Maryland roads.[2] Each purchased a bus, but refused to pay the tax on the ground that § 25A was invalid under the Commerce Clause as applied to interstate carriers. They were denied certificates of title by the State and thereupon filed petitions for mandamus to secure them. The Maryland Court of Appeals sustained the levy, 64 A. 2d 284, and the case is here on appeal. 28 U. S. C. § 1257 (2).

I. Since "a State may not lay a tax on the privilege of engaging in interstate commerce," the titling tax can be

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[1] The relevant portion of § 25A reads more fully as follows:

"In addition to the charges prescribed by this Article there is hereby levied and imposed an excise tax for the issuance of every original certificate of title for motor vehicles in this State and for the issuance of every subsequent certificate of title for motor vehicles in this State in the case of sales or resales thereof, and on and after July 1, 1947, the Department of Motor Vehicles shall collect said tax upon the issuance of every such certificate of title of a motor vehicle at the rate of two per centum of the fair market value of every motor vehicle for which such certificate of title is applied for and issued."

[2] Although two of the appellants also engage to some extent in intrastate transportation, it was not argued either here or below that this has any bearing on the case. Cf. *Sprout* v. *South Bend*, 277 U. S. 163, 170–71.

sustained only if it be a fair imposition for the use of highways constructed and maintained by Maryland or for the cost of traffic regulation. *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 185; see also *Dixie Ohio Express Co.* v. *State Revenue Comm'n,* 306 U. S. 72, 76. The right of a State to levy such a compensatory tax also as to interstate commerce for special benefits is well settled. The subjection of interstate motor traffic to such State power is only a particular application of a general principle. *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, 267–68, and cases cited. But whether the tax now under review comes within the scope of the principle must be tested by the considerations which have guided prior adjudication. (All of the cases in which this Court has dealt with our specific problem are listed, and their relevant facts described, in an Appendix to this opinion, *post,* p. 561.) If a new principle is to be announced, it, too, must stand the test of reason in relation to the Commerce Clause.

Since the levy is upon commerce exclusively interstate; and therefore inevitably an inroad upon its normal freedom from State burdens, Maryland must justify it as a means of securing compensation for the road use which the State affords and for which it may exact a return. *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183. This requirement is not a close accounting responsibility, however, for the States are free to exercise a loose judgment in fixing a *quid pro quo.* Thus, tax formulas dependent on actual use of the State's highways satisfy the constitutional test, without more, since they reflect an obvious relationship between what is demanded and what is given by the State. Taxes based on miles or ton-miles have encountered no difficulty here. *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352.

Again, if the State makes clear by disposition of the tax proceeds or by statutory declaration that the tax is levied to secure compensation for road use, the tax classification will be sustained if it may fairly be attributed to the privilege of road use, as distinguished from actual use. Compare *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183 (no allocation of proceeds) with *Clark* v. *Poor,* 274 U. S. 554 (allocation); see Appendix, *post,* p. 561. Thus, mileage may be ignored and an annual tax may be based on horsepower, *Hendrick* v. *Maryland,* 235 U. S. 610, and *Kane* v. *New Jersey,* 242 U. S. 160; on carrying capacity, *Clark* v. *Poor,* 274 U. S. 554, and *Hicklin* v. *Coney,* 290 U. S. 169; and on manufacturer's rated capacity, *Dixie Ohio Express Co.* v. *State Revenue Comm'n,* 306 U. S. 72. And the Court has upheld flat fees imposed without regard to size or weight factors. *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n,* 295 U. S. 285; *Morf* v. *Bingaman,* 298 U. S. 407; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583; *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495.

From this body of decisions, the Court now extracts the principle that, so long as a tax is levied for highway purposes and does not formally discriminate against interstate commerce, it cannot be attacked for its tax formula or classification, but only for "excessiveness" of amount. Such a view collides with the guiding limitation upon State power announced in *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 186, that a tax intended to compensate for road use "will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory." This wary qualification was formulated for the Court by Mr. Justice Brandeis, who was most alert not to deny to States the right to make interstate commerce pay its way. Likewise, today's opinion disregards *McCarroll* v. *Dixie Greyhound*

Lines, Inc., 309 U. S. 176, holding a tax invalid simply because the standard of measurement was found to be unrelated to what the State gave. In that case, the tax was declared to be imposed upon the privilege of highway use and the proceeds were allocated, and, as here, it was sought to justify the tax as levied for that purpose. There was no showing that the State was collecting sums in excess of its needs or that the carrier was being subjected to severe economic strain. The defect lay in the capricious tax formula.

In no prior case has the Court upheld a tax formula bearing no reasonable relationship to the privilege of road use. No support to the result now reached is lent by the fact that State tax formulas need not be limited to factors reflecting actual road use, such as mileage, but may be measured by the privilege of highway use extended to all alike. In a case involving a flat tax characterized as "moderate," the matter was illuminatingly put for the Court by Mr. Justice Cardozo:

> "There would be administrative difficulties in collecting on that basis [*i. e.*, mileage]. The fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U. S. 285, 289.

Systems of taxation need not achieve the ideal. But the fact that the Constitution does not demand pure reason and is satisfied by practical reason does not justify unreason. Though a State may levy a tax based upon the privilege granted, as distinguished from its exercise, this does not sanction a tax the measure of which has no reasonable relation to the privilege. Reason precludes

the notion that a tax for a privilege may disregard the absence of a *nexus* between privilege and tax. Our decisions reflect that reason. A State naturally may deem factors of size or weight to be relevant. *Hicklin* v. *Coney,* 290 U. S. 169, 173. Since the relationship of these factors to highway construction and maintenance costs cannot be measured with even proximate accuracy, the States are not hobbled in exercising rough judgment in devising tax formulas, giving to size, weight and other relevant factors such respect as is fairly within the restraints of decency. Cf. *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 594. And a State, with an eye to the problems of tax administration, may also reasonably conclude that under some circumstances such factors are not sufficiently significant or material to call for insistence upon impractical details, and that a flat tax is proper. In the cases involving flat taxes, the Court carefully pointed out that the classification was reasonable on the facts before it. *Morf* v. *Bingaman,* 298 U. S. 407, 410; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 600; *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495, 506.

Maryland's titling tax fails to meet the justifications that sustain a State's power to levy a tax on what is exclusively the carrying on of interstate commerce. Giving the State court's judgment every indulgence for supporting its validity, one cannot find any fair relationship between the tax and actual road use or the privilege of such use. The value of a vehicle is not a practical function of what the State affords. It has at best a most tenuous relationship to the privilege of using the roads, since differences in value are due to a vehicle's appointments or its age or to other factors which have no bearing on highway use. Differences in the cost of vehicles based on such factors, reflecting in large measure the financial condition of owners or their investment policies, can

hardly furnish a standard by which a return for road use may be measured.

This irrelevance in the basis of the tax is reinforced by the irrelevance of its incidence. For the tax is exacted not only on the original purchase of the vehicle but upon its subsequent transfer to a new owner. If the tax be treated as one on the vehicle, then it is attributable not to the privilege of road use but to a shift in its ownership. If the tax is deemed to be upon the owner, then it depends not upon the privilege of road use but upon the frequency of turnover of his equipment. Unlike all the comparable taxes heretofore sustained, the Maryland tax is measured by considerations extraneous to the State's right to impose it.

The Court in effect concedes this, but proceeds on the theory that the basis of such a road tax need not be intrinsically reasonable. Validity is treated as a question of dollars and cents; only the amount of the tax may be questioned. It should occasion no surprise that such a test breaks wholly new ground. Amount has of course played a part in the total context of prior decisions and it raises issues to which I shall shortly advert. But a test of amount has never been regarded as in itself a substitute for a reasonable tax classification. While novelty of doctrine does not prove unconstitutionality, neither does it establish constitutionality. If no prior decision gives any warrant for determining the validity of a State tax on commerce going through it merely by the size of the financial burden which such a tax entails, the reason is obvious enough. It would cast what is surely not a judicial function upon this Court to decide how big an amount, abstractly considered, can economically be absorbed by a carrier engaged exclusively in interstate commerce as an exaction by each State through which the carrier

passes.[3] Contrariwise, it is within the competence of judges to determine the fair relevance of criteria in achieving allowable ends. How criteria work in specific cases involves familiar practicalities in the administration of law.

No doubt difficulties are encountered by the States in formulating classifications for tax purposes which express the needed accommodation in our federalism between due regard for the special facilities afforded by States to interstate commerce for which they require compensation, and that freedom of commerce across State lines the desire for which was one of the propelling forces for the establishment of this nation and the benefits of which are one of its greatest sources of strength. Of course this Court must not unduly rein in States. Practical, not ideal, lines must be drawn, which means that within the broadest reach of policy relevant to the States' basis of taxation a wide choice must be allowed to the States of possible taxes on motor vehicles traveling in interstate commerce. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583. But simply because many tax formulas may be devised does not mean that any formula will do. Of course, the problem involves matters of degree. Drawing lines, recognition of differences of degree, is perhaps the chief characteristic of the process of constitutional adjudica-

[3] The Court, to be sure, does not avow that the validity of the tax depends on the relation of its size to the financial condition of the carrier. But such is the effective consequence of the considerations by which it determines validity. Once the Court abandons, as it does, an inquiry into the reasonableness of the tax basis in relation to the allowable purposes of the tax, there is nothing by which the validity of the imposition can be judged except its effect upon the finances of the carrier, unless perchance the matter is to be left wholly at large. Even in that event, the Court is bound to make *ad hoc* judgments that the particular amount a State asks of a carrier is not going to hurt it.

tion. Difficulties in applying the test of reason do not justify abandonment of reason for the impossible task of deciding fiscal fairness to each individual carrier.

II. Since the basis of its imposition is fatally defective, the Maryland tax cannot be saved by its amount. But quite apart from its formula, there are serious questions relating to the amount of this tax which the Court disregards. There is a show of fairness in the Court's suggestion that the tax will be declared bad if the amount exacted exceeds "fair compensation" to the States. The term is not self-defining and no intimation is afforded regarding the standards by which excessiveness is to be determined. Reference is made to *Ingels* v. *Morf*, 300 U. S. 290. Presumably, therefore, the Court is still committed to the view that a tax may not be so high that amounts collected by the State are clearly in excess of the costs of the special facilities or regulations for which the tax is professedly levied. Like other forms of interstate commerce, motor carriers should be required to contribute their fair share, broadly conceived, of the State's distinctive contribution for the carrying on of such commerce. Under the guise of a special compensatory tax, however, a State may not exact more than the value of the services to be compensated. There is no showing that the tax levied here is excessive in this sense.

But for the proper maintenance of our federal system, and more particularly for the rigorous safeguarding of the national interests in interstate commerce, it is not sufficient that a State exact no more than the value of what it gives—with all the elusiveness of determining such value. A State must not play favorites in the operation of its taxing system between business confined within its borders and the common interests of the nation expressed through business conducted across State lines. Such favoritism is barred whether it is overtly designed or

results from the actual operation of a taxing scheme. The Maryland tax does not obviously discriminate against interstate commerce. But a tax for the privilege of road use may impose serious disadvantages upon that commerce.

So long as a State bases its tax on a relevant measure of actual road use, obviously both interstate and intrastate carriers pay according to the facilities in fact provided by the State. But a tax levied for the privilege of using roads, and not their actual use, may, in the normal course of operations and not as a fanciful hypothesis, involve an undue burden on interstate carriers. While the privilege extended by a State is unlimited in form, and thus theoretically the same for all vehicles, whether interstate or intrastate, the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, *i. e.*, because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier. And because it operates in other States there is danger—and not a fanciful danger—that the interstate carrier will be subject to the privilege taxes of several States, even though his entire use of the highways is not significantly greater than that of intrastate operators who are subject to only one privilege tax.[4]

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[4] These dangers are heightened when the tax falls upon an interstate motor carrier authorized to operate only on a fixed route. Quite illustrative of the seriousness of the general problem are the facts concerning one of appellants here, Capitol Greyhound Lines, which is authorized by the I. C. C. to operate a bus line over a fixed route between Cincinnati, Ohio and Washington, D. C., a distance of about 496 miles, only nine of which are over Maryland's State roads. To say that Capitol has an unlimited privilege to use Mary-

When a privilege tax is relatively small in amount, and therefore to be treated as a rough equivalent for what the State may exact with due regard to administrative practicalities, the danger of an unfair burden falling upon interstate commerce remains correspondingly small. Cf. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 210–11. But a large privilege tax presents dangers not unlike those arising from unapportioned gross receipts taxes on interstate transportation beyond a State's power to impose. Cf. *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653. These practical considerations prevailed against a State in *Sprout* v. *South Bend*, 277 U. S. 163:

> "A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." 277 U. S. at 170.[5]

That the Court has at all times been aware of this problem is demonstrated by its reiteration throughout the relevant decisions that the charge must be "reasonable in amount." See especially *Aero Mayflower Transit Co.* v. *Georgia Comm'n*, 295 U. S. 285, 289: "The fee is moderate

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land's roads and is therefore being treated on a par with intrastate carriers is to ignore the admonition that "Regulation and commerce among the States both are practical rather than technical conceptions . . . ." *Galveston, Harrisburg and San Antonio R. Co.* v. *Texas*, 210 U. S. 217, 225.

[5] Mr. Justice Brandeis' reference to a flat tax was not intended to exclude size or weight taxes, for the *Sprout* case involved a tax based upon seating capacity. Rather, he was referring to privilege, as distinguished from mileage, taxes.

The potentiality of unfair burdens on interstate commerce was presented sharply in the *Sprout* case since the tax was levied by a municipality and there were 33 other cities along the route of the interstate carrier. See 277 U. S. at 164.

in amount," and *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495, 507: ". . . the aggregate amount of both taxes combined is less than that of taxes heretofore sustained."

The problem is inescapably one of determining how much is too much, in the total nature of the tax. Thus, it becomes important to see how the Maryland tax compares in amount with similar taxes in prior cases. This is done, not to test the tax as individually applied to appellants, but to determine whether general application of a tax of this magnitude may fairly be deemed to burden interstate commerce unduly. Examination of decided cases reveals that the largest flat tax heretofore sustained was $15 for six months or $30 per year, and the largest annual tax based upon size or weight was $75.[6] See Appendix to this opinion, *post,* p. 561. The Maryland taxes on the three appellants amounted to $372, $505 and $580, but since the Maryland tax is not annual, these amounts are not comparable to amounts previously sustained. In order to equate them, information is needed as to the number of years typical motor carriers are likely to operate such busses over Maryland roads. Even taking the assumption of the Maryland Court of Appeals, not based on any evidence in the record, that five years was a fair estimate,[7] the amounts are in excess of any sustained by

[6] The statute in *Clark* v. *Poor,* 274 U. S. 554, provided for a range of taxation of from $20 to $200, and that in *Hicklin* v. *Coney,* 290 U. S. 169, a range of from $30 to $400. But in neither case was evidence introduced as to the amounts to which the particular vehicle owners would be subject, and so the Court was not faced with the question whether the amount was reasonable. See Appendix, n. 3, *post,* p. 561.

[7] The Maryland court estimated the "useful life" of the busses. It should have considered the probable period of use by a typical motor carrier since the tax is imposed upon any transfer of the vehicle to another.

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this Court. Therefore, even if the Court were to accept the formula of the Maryland titling tax, the case should be remanded for a finding of the anticipated period of use in order to have some basis of appraising the validity of the amount.

III. The Court's failure to treat the danger that large privilege taxes will unduly burden interstate commerce—quite apart from excessiveness in terms of State costs—is not unlike its explicit rejection of the requirement that the taxing formula be reasonably related to the purpose which alone justifies the tax. Both problems involve the resolution of conflicting interests, which in application inevitably requires nice distinctions. In this case the Court attempts to avoid difficulties through what seems to me to be an exercise in absolutes. These problems involve questions of reasonableness and degree but their determination affects the harmonious functioning of our federal system. I do not believe they can be solved by disregarding the national interest merely because a State tax levied in a particular case does not on its face appear monstrous in amount. See *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355.

I would reverse.

Name of case	Type of vehicle subject to tax	Basis of tax	
1. *Hendrick* v. *Maryland*, 235 U. S. 610 (1915).	All vehicles	Horsepower	N
2. *Kane* v. *New Jersey*, 242 U. S. 160 (1916).	All vehicles	Horsepower	$1
3. *Clark* v. *Poor*, 274 U. S. 554 (1927).	Property carrier for hire	Manufacturer's rated carrying capacity plus regularity of routes.	N
4. *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245 (1928).	Passenger carrier for hire	Mileage	1¢
5. *Sprout* v. *South Bend*, 277 U. S. 163 (1928).	Passenger carrier for hire	Seating capacity	$5
6. *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183 (1931).	Passenger carrier for hire	Seating capacity	$5
7. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352 (1932).	Carrier of own property for sale.	Gross-ton mileage	5/
8. *Hicklin* v. *Coney*, 290 U. S. 169 (1933).	Property carrier for hire	Carrying capacity	N
9. *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U. S. 285 (1935).	Property carrier for hire	Flat tax	$2
10. *Morf* v. *Bingaman*, 298 U. S. 407 (1936).	Vehicles transported for sale on own wheels, usually in "caravans"— (a) Under own power. (b) Being towed.	Flat tax	
11. *Ingels* v. *Morf*, 300 U. S. 290 (1937).	Vehicles transported for sale on own wheels, usually in "caravans."	Flat tax	$1
12. *Dixie Ohio Express Co.* v. *State Revenue Comm'n*, 306 U. S. 72 (1939).	Property carrier for hire, having— (a) 1½-ton trucks. (b) 2-ton trucks. (c) Trailers.	 (a) Manufacturer's rated capacity. (b) Same. (c) Weight.	
13. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939).	Vehicles transported for sale on own wheels, usually in "caravans."	Flat tax	$1
14. *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176 (1940).	Passenger carrier for hire	All gasoline over 20 gallons carried in tanks of vehicle into State for use by vehicle.	6.
15. *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495 (1947).	Property carrier for hire	Two flat taxes	$2

[1] The information set forth here is derived from the record, briefs, and opinion in each case.
[2] Unless otherwise indicated, all taxes expressed in terms of fixed amounts were levied on an annual

ount of tax volved [2]	Range of tax amounts for the entire class [2]	Legislative indication of road-use purpose	Decision
issue [3]	$6–$18	Funds allocated for road use	Valid.
	$3–$10	Funds allocated for road use	Valid.
issue [3]	$20–$200	Funds allocated for road use	Valid.
mile		Funds allocated for road use	Valid.
	$25–$75	None	Invalid, as not being for the privilege of road use.
	$50–$750	None	Invalid, as not being for the privilege of road use.
mill per gross-mile.		Funds allocated for road use	Valid.
a issue [3]	$30–$400	Funds allocated for road use	Valid.
		Funds allocated for road use	Valid.
		Statutory declaration, without allocation of funds.	Valid.
a) $7.50. b) $5.00. o time limit)			
for 90 days)		Statutory declaration that purpose was reimbursement for regulatory expenses.	Invalid, as excessive in amount in relation to such expenses.
	Not known	Statutory declaration without allocation of funds.	Valid.
(a) $50. (b) $75. (c) $50.			
for six months)		Statutory declaration without allocation of funds.	Valid.
per gallon		Funds allocated for road use	Invalid, because formula bore no reasonable relation to road use.
in total		Statutory declaration without allocation of funds.	Valid.

asis.

[3] The attack in these cases was upon the statute as a whole, not on the specific amount of tax due and so no evidence was introduced as to such amount.

NATIONAL LABOR RELATIONS BOARD v. MEXIA TEXTILE MILLS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 434. Argued April 18, 1950.—Decided May 15, 1950.

After a hearing from which the employer withdrew without introducing any evidence, the National Labor Relations Board issued an order requiring the employer, who was engaged in interstate commerce within the meaning of the National Labor Relations Act, to cease and desist from certain unfair labor practices. Subsequently, the Board petitioned the Court of Appeals for enforcement of this order. The employer moved for leave to adduce additional evidence, alleging in substance that it had complied with the order and that the union which had been certified by the Board as bargaining representative no longer represented a majority of the employees in the bargaining unit. The Court of Appeals ordered the case referred back to the Board with directions to take evidence and report whether the order had been complied with; if so, whether the matter should not be dismissed as moot; and, if not, what recommendations the Board had to make. *Held:* The order of the Court of Appeals is vacated and enforcement of the Board's order must be decreed under § 10 (e), unless "extraordinary circumstances" are pleaded which justify the employer's failure to urge its objections before the Board. Pp. 564–570.

(a) An employer's compliance with an order of the Board does not render the cause moot nor deprive the Board of its opportunity to secure enforcement from an appropriate court, since a Board order imposes a continuing obligation and the Board is entitled to have a resumption of the unfair practice barred by an enforcement decree. Pp. 567–568.

(b) That the employer doubts the certified union's ability to muster a majority of the employees in the bargaining unit does not justify denial of an enforcement decree. P. 568.

(c) Although a motion for leave to adduce additional evidence pursuant to § 10 (e) of the National Labor Relations Act is "addressed to the sound judicial discretion of the court," the power of the court to order the taking of additional evidence cannot be employed to enlarge the statutory scope of judicial review. Pp. 569–570.

Order vacated.

The case is stated in the opinion. The opinion of the Court of Appeals is reported in 25 L. R. R. M. 2295. The order of the Court of Appeals is *vacated,* p. 570.

A. Norman Somers argued the cause for petitioner. *Solicitor General Perlman, Robert N. Denham, David P. Findling* and *Mozart G. Ratner* filed a brief for petitioner.

John M. Scott argued the cause and filed a brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a proceeding brought by the National Labor Relations Board charging unfair labor practices of the respondent, Mexia Textile Mills, a manufacturer of cotton goods at Mexia, Texas, engaged in interstate commerce within the meaning of the National Labor Relations Act[1] and the Labor Management Relations Act, 1947.[2] On the Board's petition for enforcement of its cease and desist order, the Court of Appeals for the Fifth Circuit referred the case back to the Board with directions to take evidence and report whether the order had been complied with by the respondent; if so, whether the matter should not be dismissed as moot; and, if not, what recommendations the Board had to make. We granted certiorari upon the claim that the effect of the order of the Court of Appeals was at variance with previous decisions of this Court. 338 U. S. 909 (1950).

The pertinent facts are these. In November 1944, the Board conducted an election at the respondent's plant, in which the Textile Workers Union of America, C. I. O., received an overwhelming majority.[3] The Board thereupon certified that Union as the exclusive representative

[1] 49 Stat. 449, 29 U. S. C. § 151 *et seq.*

[2] 61 Stat. 136, 29 U. S. C. (Supp. III) § 141 *et seq.*

[3] 146 of the 164 valid votes were cast in favor of the union, of the approximately 186 eligible voters.

of those production and maintenance employees who constituted the appropriate bargaining unit designated by the Board. In January 1947 the Union filed a charge with the Board complaining that respondent had refused to bargain collectively in good faith with the Union and was thus guilty of unfair labor practices within the meaning of §§ 8 (1) and 8 (5) of the National Labor Relations Act. The Board issued its complaint pursuant to those charges in June 1947. Respondent, in answer, admitted that it was engaged in interstate commerce within the meaning of the Act, denied the charges contained in the complaint, and alleged, *inter alia,* that the Union no longer represented a majority of employees in the bargaining unit, though the number of employees who had withdrawn was unknown to respondent. A hearing was held before a trial examiner in August 1947. The Trial Examiner denied respondent's motions for a more definite statement of the complaint, and for an order permitting the inspection and copying of certain evidence. Respondent's counsel thereupon withdrew from the hearing and took no further part therein.

In December 1947 the Trial Examiner issued his report. He concluded that "From the evidence, it is apparent that, although the respondent conferred with the Union on possible contract provisions, it did not bargain in good faith and had no intention of doing so." The failure to bargain was manifest from evidence of incidents taking place from the time of the certification of the Union until a month before its complaint was filed. Unilateral wage increases and respondent's efforts to shunt the Union representatives from one company official to another in search of the final authority in wage and contract negotiations—these and other findings led the Examiner to conclude that "an unmistakeable effort to escape genuine collective bargaining" was demonstrated. Further, the Examiner determined, there was no merit in the respond-

ent's contention that the Union did not retain the membership of a majority of employees in the bargaining unit. Respondent, having taken no part in the hearing, did not of course introduce any evidence to support its allegation.

The Examiner recommended, in substance, that respondent be ordered to cease and desist from its refusal to bargain in good faith with the Union. No exceptions to the report were filed within the time permitted by § 10 (c) of the Labor Management Relations Act, and in July 1948 the Board adopted the Trial Examiner's findings and issued the recommended order, as required by § 10 (c).

In April 1949 the Board petitioned the Court of Appeals for the Fifth Circuit for enforcement of its order. Respondent filed a motion for the taking of additional evidence, alleging that since the report of the Trial Examiner, "during the year 1948," it had "entered into good faith bargaining with the Union," but that an agreement had been prevented by the Union's "arbitrary, capricious and intransigent attitude . . . ." A copy of a letter respondent had sent to the Board's Regional Director, shortly after the Trial Examiner's report, was attached to respondent's motion. The letter stated that while respondent "did not see fit to argue" about past "disagreements and strikes" before the Trial Examiner, it was then "more than willing to accept [his] recommendations . . . ." Respondent also alleged that after "the record in the instant case was closed" it had come to the conclusion that the Union no longer represented a majority of employees in the bargaining unit.

On June 3, 1949, the Court of Appeals for the Fifth Circuit ordered that

> "action on petitioner's motion should be deferred and the matter be referred back to the Board with directions to take evidence and report: (1) whether and to

what extent its order has been complied with by respondent; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises . . . ."

We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court.[4] Indeed, the Court of Appeals for the Fifth Circuit has apparently recognized this rule both before and after the decision in the instant cases.[5] A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree. As the Court of Appeals for the Second Circuit remarked, "no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing

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[4] *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271 (1938); *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 230 (1938); *Labor Board* v. *Crompton-Highland Mills*, 337 U. S. 217, 225 (1949); *Labor Board* v. *Draper Corp.*, 159 F. 2d 294, 297 (C. A. 1st Cir. 1947); *Labor Board* v. *Remington Rand*, 94 F. 2d 862, 869–870 (C. A. 2d Cir. 1938); *Labor Board* v. *Condenser Corp.*, 128 F. 2d 67, 81 (C. A. 3d Cir. 1942); *Labor Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 55 (C. A. 4th Cir. 1944); *Labor Board* v. *Toledo Desk & Fixture Co.*, 158 F. 2d 426 (C. A. 6th Cir. 1946); *Labor Board* v. *Bachelder*, 125 F. 2d 387, 388 (C. A. 7th Cir. 1942); *Labor Board* v. *Swift & Co.*, 129 F. 2d 222, 224 (C. A. 8th Cir. 1942); *Labor Board* v. *American Potash & Chemical Corp.*, 98 F. 2d 488 (C. A. 9th Cir. 1938); *Pueblo Gas & Fuel Co.* v. *Labor Board*, 118 F. 2d 304, 307 (C. A. 10th Cir. 1941). Cf. *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938).

[5] *Labor Board* v. *Fickett-Brown Mfg. Co.*, 140 F. 2d 883, 884 (1944); *Labor Board* v. *The Cooper Co.*, 179 F. 2d 241 (1950).

sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear." *Labor Board* v. *General Motors Corp.*, 179 F. 2d 221, 222 (1950). The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices.

That the respondent doubts the Union's ability to muster a majority of the employees in the bargaining unit does not justify the denial of an enforcement decree. Explicit congressional policy stands in the way of permitting the employers to stall enforcement of the Board's orders on this ground. Under § 9 (c) of the Act "an employee or group of employees or any individual or labor organization acting in their behalf" may "assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a) . . . ." § 9 (c) (1) (A) (ii). Petitions by the employer concerning selection of bargaining representatives are limited to those "alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a) . . . ." § 9 (c) (1) (B). To authorize the employer to assert diminution in membership in the certified union in an enforcement proceeding subverts the statutory mandate to leave these matters to the Board in separate proceedings under § 9 (c).[6]

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[6] See *Labor Board* v. *Remington Rand*, 94 F. 2d 862, 869–870 (C. A. 2d Cir. 1938). See also, §§ 203.46, 203.47 of the Board's regulations under the Wagner Act, 11 Fed. Reg. 177A–605, 177A–610 (1946), and §§ 203.52 and 203.53 of the rules printed at 12 Fed. Reg. 5651, 5662 (1947); *Labor Board* v. *Biles-Coleman Lumber Co.*, 96 F. 2d 197 (C. A. 9th Cir. 1938). Compare *Franks Bros. Co.* v. *Labor Board*, 321 U. S. 702, 705–706 (1944).

The Board has held that it is the forum before which an employer may challenge a certified union's continued representative status, *Matter of Whitney's*, 81 N. L. R. B. 75 (1949), in § 9 (c) proceedings.

It is of course equally clear that a motion for leave to adduce additional evidence pursuant to § 10 (e) of the labor relations acts is "addressed to the sound judicial discretion of the court," *Southport Petroleum Co.* v. *Labor Board*, 315 U. S. 100, 104 (1942); *Labor Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9 (1943). We are told that the order of the Court of Appeals is justified in this case because the issue of compliance, so clearly irrelevant in the ordinary course of review, is imbued with relevance should the respondent's counsel move to adduce additional evidence when the case reaches the Court of Appeals.

The cases are to the contrary. *Labor Board* v. *Condenser Corp.*, 128 F. 2d 67, 81 (C. A. 3d Cir. 1942); *Labor Board* v. *Swift & Co.*, 129 F. 2d 222, 224 (C. A. 8th Cir. 1942); *Labor Board* v. *American Potash & Chemical Corp.*, 98 F. 2d 488, 493 (C. A. 9th Cir. 1938), and cases therein cited. If compliance with an order of the Board is irrelevant to the reviewing court's function after the new evidence has been adduced, we do not see that there is point in adducing evidence of that compliance. This Court has emphasized that the "power to adduce additional evidence granted to the Circuit Court of Appeals by § 10 (e) cannot be employed to enlarge the statutory scope of judicial review." *Labor Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 234–235 (1947). As the managers on the part of the House of Representatives for the Conference Committee reported concerning the Wagner Act, that statute contemplated that there be "immediately available to the Board an existing court decree to serve as a basis for contempt proceedings," in the event a renewal of the unfair practice occurs after the enforcement order. H. R. Rep. No. 1371, 74th Cong., 1st Sess., p. 5. See also H. R. Conf. Rep. No. 510, on H. R. 3020, 80th Cong., 1st Sess., p. 55; compare H. R. Rep. No. 245, on H. R. 3020, 80th Cong., 1st Sess., pp. 43, 93. Section 10 (e), which "in effect formulates a famil-

iar principle regarding newly discovered evidence," *Labor Board* v. *Donnelly Garment Co., supra,* 330 U. S. at 234, does not authorize a discretion so broad that evidence irrelevant as a matter of law may be considered "material." Compare *Griffin* v. *United States,* 336 U. S. 704, 708 (1949), with *United States* v. *Johnson,* 327 U. S. 106 (1946).

The cases cited by respondent do not touch this controlling issue. The order of the Court of Appeals must be vacated and the enforcement of the Board order decreed pursuant to § 10 (e), unless "extraordinary circumstances" are pleaded which justify the respondent's failure to urge its objections before the Board.

It is so ordered.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, dissenting.†

Compliance with an order of the National Labor Relations Board is, of course, no defense to the Board's petition for judicial enforcement of its order. Therefore, a Court of Appeals would be abusing the authority conferred by § 10 (e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947,* if, upon such a petition for enforcement, it even tempo-

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† [NOTE: This dissent applies also to No. 435, *National Labor Relations Board* v. *Pool Manufacturing Co., post,* p. 577.]

*Section 10 (e) provides in part:

"If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript." 61 Stat. 148, 29 U. S. C. (Supp. III) § 160 (e).

rarily withheld enforcement merely for the purpose of asking the Board to report to it whether the order had already been complied with. Even if it had, the Board is entitled to a formal decree as a safeguard against repetition of the unfair labor practice. If in the cases before us the Court of Appeals had, by seeking light from the Board on the issue of compliance, in effect ruled that compliance with an order of the Board was relevant to enforcement, it would be incumbent upon this Court, in the fair administration of law, to issue its discretionary writ of certiorari and reverse the orders of the Court of Appeals summarily.

But the action of the Court of Appeals in these two cases cannot fairly be interpreted as defiance of the settled principle of law that compliance by an employer with the Board's order is not a defense to an application for its enforcement. In a series of decisions prior to its actions in these two cases, the Court of Appeals for the Fifth Circuit, in common with all other circuits, has enforced orders of the Board despite allegations of compliance. Nor are these two cases to be interpreted as departures from the principle which that court has heretofore recognized and obeyed. It has explicitly advised us that the opinions and orders in these two cases "were not intended to be, they were not, departures" from the established rule. *Labor Board* v. *Cooper Co.*, 179 F. 2d 241. Whatever justification there may have been when we granted certiorari for attributing to the court below a *volte-face* on its own repeated application of a settled principle of law, there was none after its decision in the *Cooper* case ten days later. Yet it is only by attributing to the Court of Appeals a departure which that court has disavowed that it may be charged with an abuse of discretion which alone would have warranted our taking these cases for review.

The fact is that in both these cases representations were made to the Court of Appeals of circumstances arising subsequent to the orders issued by the Board which amount to more than a claim that the employer had complied with what the Board had directed. The claims concern change in the union affiliation of employees and recalcitrance on the part of the union, and not of the employer, toward effectuating the Board's order. To be sure, there was a clause in the court's order which, taken abstractly, looked as though the court desired to be informed on the issue of compliance and the Court of Appeals did not spell out with particularity these other claims, but they were embraced in a catch-all clause for further "evidence and report" by the Board.

This raises for me important issues of judicial administration. Due regard for the considerations that should govern the exercise of our discretionary jurisdiction and for the effective functioning of the Courts of Appeals in the whole scheme of the federal judiciary indicates dismissal of these writs.

We are dealing with one of the appellate tribunals of the United States to which Congress has seen fit to commit the final determination of this type of controversy, subject only to the reviewing power of this Court. Review is to be exercised, however, not as a matter of course, but only in those rare instances where constitutional issues, or conflicts of circuits, or obvious considerations of a public importance call for our adjudication. In establishing the Courts of Appeals, Congress intended to create courts of great dignity and ability whose decisions were to be final except in the very limited instances where the Supreme Bench should pronounce for the whole nation. This design for the Courts of Appeals was powerfully reinforced by the Judiciary Act of 1925, 43 Stat. 936, in that it withdrew all but a few categories of cases from the obligatory jurisdiction of this Court. The volume of

business that would be drawn to this Court by the overriding national importance of the issues was bound to be so heavy that adequate disposition of them was assumed to preclude the grant of certiorari in cases, however erroneously decided below, in which the incidence of error was too small compared with the drain that their consideration would make on the thought and energy demanded of this Court by the cases which inevitably belong here. And so the Court has said again and again that the writ of certiorari ought not to be employed to bring here cases which, in their essential impact, concern a restricted and perhaps a unique set of circumstances and do not involve the pronouncement by a Court of Appeals of a general doctrine on which this Court ought to have the last say.

No candid student of the actual operation of certiorari can feel confident that the criteria professed for its exercise have been adequately respected. This Court is too frequently engaged in deciding cases which ought not to occupy the highest Court in the land, because they divert its energy from those matters to which it cannot give too much unburdened thought. And when comparison is made between the issues at stake in petitions that have been granted and those in which petitions have been denied, the contrast is at times glaring.

This has two consequences that are to be deprecated in the administration of the federal courts, and they are avoidable without aiming at the moon. By taking cases that ought not to be taken we obviously encourage petitions to be filed that have no excuse for being here. The fact that term after term hundreds of petitions are denied indicates that our screening process is such as to encourage the hope that is eternal in the breast of losing counsel. One does not have to be an easy generalizer of national characteristics to believe that litigiousness is one of our besetting sins. A relaxed observance of the considera-

tions that supposedly govern our certiorari jurisdiction is not calculated to discourage litigiousness.

Equally undesirable is the effect, however insidious, upon Courts of Appeals. If, barring only exceptional cases, they are to be deemed final courts of appeals, consciousness of such responsibility will elicit in them, assuming they are manned by judges fit for their tasks, the qualities appropriate for such responsibility. Contrariwise, encouragement in regarding Courts of Appeals merely as way-stations to this Court is bound to have a weakening effect on the administration of tribunals whose authority and qualities we should be alert to promote.

These are general considerations, but due regard for them goes, I believe, to the very marrow of high judicial performance. Let me apply them to the cases in hand. A year ago three circuit judges of long experience deferred motions of the National Labor Relations Board for enforcement of its orders (one of which had been outstanding for two and one-half years) by requesting the Board for "additional evidence" which these judges deemed material. The court made this request under § 10 (e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, with respect to various claims, outlined above, as they emerged in the proceedings before it. When it was confronted with the employers' applications for leave to adduce such additional evidence, the court presumably examined the cases in this Court as to the nature of its power to grant them and noted that our cases held that such applications are "addressed to the sound judicial discretion of the court." *Southport Petroleum Co.* v. *Labor Board,* 315 U. S. 100, 104; *Labor Board* v. *Donnelly Garment Co.,* 330 U. S. 219, 233–34. In granting the applications, the court, expressly reserving decision on the merits, merely referred the matters back to the Board for its assistance in furnishing fur-

ther information and for its recommendations and requests "in the light of such further information." Indeed, that court has rather plaintively explained that in the two cases which are now reversed "nothing was decided." *Labor Board* v. *Cooper Co.*, 179 F. 2d 241.

The Court notes that the Board has held that the continued majority status of a certified union may be challenged by an employer in § 9 (c) proceedings. *Whitney's*, 81 N. L. R. B. 75. There is neither explicit authorization nor explicit denial in the statute of the right of an employer to make such a challenge in enforcement proceedings. Nothing in the text or context of the statute or any consideration underlying its policy precludes the relevance of continued majority status to enforcement, especially where loss of majority may be due to employee dissatisfaction with alleged union intransigence. It appears to me arbitrary to deny to a Court of Appeals, in the fair exercise of its discretion under § 10 (e), the right to ask the Board for light on this issue, if for no other reason than that the Board's views would be helpful in the judicial determination of the issue.

Fully mindful of the heavy load of cases before the Board, I venture to suggest that it could have speedily disposed of the matters that on the record appeared to trouble the Court of Appeals, could have reported back to the court, and could have secured a prompt disposition of its petitions for enforcement. Any adverse rulings by the court could then have been brought here by the Board, not with any ambiguity inherent in a discretionary ruling, but with the full clarity of an adjudication on the merits. Instead, the Board comes here to review the court's interim orders, petitions for certiorari resting on a special set of unique circumstances are granted, and the Court of Appeals is now reversed by attributing to it a disavowed disregard of an important principle in the administration of the Labor Management Relations Act.

In the light of the entire series of decisions by the Court of Appeals for the Fifth Circuit, both before and after the orders in this case, it does not seem to me reasonable to interpret the orders now before us as demands on the Board for findings merely as to compliance with the orders sought to be enforced. That court's decisions preclude such intendment. Since the record permits, we ought to attribute to a Court of Appeals not a willful disregard of principle and, as such, an abuse of discretion, but an honest desire to get light on happenings after the Board's orders relevant to its duties as a court of equity. Courts of Appeals are also human institutions. By attributing to the Court of Appeals an abusive exercise of discretion when the record may fairly be otherwise interpreted, we not only needlessly rebuke that court; we take action calculated to chill other judges in exercising with utter freedom a discretion which we have heretofore pronounced they possess.

I would leave the action of the Court of Appeals to take the course which I believe wisely should have been taken when their orders were entered. To that end, I would dismiss these writs as improvidently granted.

Syllabus.

NATIONAL LABOR RELATIONS BOARD v. POOL MANUFACTURING CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 435. Argued April 18, 1950.—Decided May 15, 1950.

In December 1943, the National Labor Relations Board certified a union as the exclusive bargaining representative of certain employees of respondent, a corporation engaged in interstate commerce within the meaning of the National Labor Relations Act. In August 1946, the Board ordered respondent to cease and desist from its refusal to bargain with the union and to offer reinstatement and back pay to employees who had gone on strike. In February 1949, the Board petitioned for enforcement of this order. Respondent moved for leave to adduce additional evidence, alleging that it had bargained unsuccessfully with the union since the date of the order; that the union had made no effort to bargain since early in 1948; and that, after the record in the case was closed, facts had come to respondent's attention which caused respondent to question whether the union retained the majority of the employees in the bargaining unit. The Court of Appeals ordered the case referred back to the Board with directions to take evidence and report whether the order had been complied with; if so, whether the matter should not be dismissed as moot; and, if not, what recommendations the Board had to make. *Held:* The order of the Court of Appeals is vacated and enforcement of the Board's order must be decreed pursuant to § 10 (e), unless "extraordinary circumstances" are pleaded which justify respondent's failure to urge its objections before the Board. *Labor Board* v. *Mexia Textile Mills, ante*, p. 563. Pp. 578–582.

(a) In this case, the fact that the Board waited two and one-half years before seeking enforcement of its order was not fatal and cannot save the order entered by the Court of Appeals. Pp. 579–582.

(b) A strict judicial time limitation of the duration presented in this case would frustrate the deliberate purpose of Congress in permitting, but not requiring, resort to an enforcement decree. P. 580.

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(c) Those intent upon violating the Act may not escape through the use of delaying tactics in negotiation, culminating in the filing of motions for leave to adduce evidence when enforcement is sought, thus effectively frustrating the Board's order. P. 582.

Order vacated.

The case is stated in the opinion. The opinion of the Court of Appeals is reported in 24 L. R. R. M. 2147. The order of the Court of Appeals is *vacated*, p. 582.

A. Norman Somers argued the cause for petitioner. *Solicitor General Perlman, Robert N. Denham, David P. Findling* and *Mozart G. Ratner* filed a brief for petitioner.

John M. Scott argued the cause and filed a brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case is a companion to *Labor Board* v. *Mexia Textile Mills, ante*, p. 563, decided this day. Respondent is a manufacturer of clothing in Texas, and is engaged in interstate commerce within the meaning of the labor relations acts.[1] In December 1943, the National Labor Relations Board designated Local Union No. 251 of the United Garment Workers of America, affiliated with the American Federation of Labor, the exclusive bargaining representative of certain of respondent's employees. In December 1945, the Union charged the respondent with violations of §§ 8 (1) and 8 (5) of the National Labor Relations Act in connection with a strike going on at that time. The Board's complaint was issued pursuant to these charges in April 1946; a hearing was held; the Trial Examiner's intermediate report was issued; and, since no exceptions to the report were entered by the respondent, the Board, on August 26, 1946, adopted the

[1] 49 Stat. 449, 29 U. S. C. § 151 *et seq.*; 61 Stat. 136, 29 U. S. C. (Supp. III) § 141 *et seq.*

Trial Examiner's findings,[2] conclusions and recommendations, and ordered the respondent to cease and desist from its refusal to bargain with the Union. With certain limitations, the company was also ordered to offer reinstatement and back pay to employees who had gone on strike. 70 N. L. R. B. 540 (1946).

Two and one-half years later, on February 17, 1949, the Board petitioned the Court of Appeals for the Fifth Circuit for the enforcement of its order. Respondent moved for leave to adduce additional evidence. It stated that it had bargained with the Union since the date of the order, but that no agreement had been reached; that the Union had made no effort to bargain since early in 1948; that respondent questioned whether the Union retained the majority of employees in the bargaining unit, since certain employees had informed respondent that they had left the Union, and the Union's organizer had stated, according to respondent, that a rival union had a "substantial group" within its membership; that these facts had come to respondent's attention since the "record in the instant case was closed and completed"; and finally that the passage of the statute imposing a duty upon the Union to bargain with the respondent might affect the disposition of the case before the Board.

On May 13, 1949, the Court of Appeals for the Fifth Circuit entered an order identical in pertinent part with that quoted in *Labor Board* v. *Mexia Textile Mills, ante,* p. 563. We granted certiorari, 338 U. S. 909 (1950).

Although respondent concedes that the decision in the *Mexia* case governs the case at bar, a single issue may deserve separate treatment. In the instant case the Board waited two and one-half years before it sought enforcement of its order. There is a suggestion that the

[2] Including the Trial Examiner's rejection of the employer's allegation that the Union no longer represented the majority in the bargaining unit.

length of the delay may have influenced the Court of Appeals in ordering the Board to take evidence on the question of compliance. We regard this as doubtful, in view of its identical action in the *Mexia* case, when the petition for enforcement was filed only nine months after the Board's order. But in any event we view the delay as without consequence in this case.

The Board is of course charged with primary responsibility in effectuating the policies of the Act. It has determined that those policies are advanced in some cases by resorting to the processes of negotiation with the employer rather than the compulsion, as well as the trouble and expense, of an enforcement decree. See § 202.13 of the Board's earlier regulations regarding the Labor Management Relations Act, 12 Fed. Reg. 5651, 5653 (1947). In some cases delay in enforcement may be helpful in reaching an immediate solution of the problem; in others, exhaustion of negotiation techniques before a decree is requested may consume many months after the Board's order and before such techniques fail. We are of the opinion that a strict judicial time limitation of the duration presented in the instant case would frustrate the deliberate purpose of Congress in permitting, but not requiring, resort to an enforcement decree.[3] Cf. § 10 (b), which states a definite period of limitation regarding charges filed with the Board. Compare *Labor Board* v. *American Creosoting Co.*, 139 F. 2d 193 (C. A. 6th Cir. 1943); *Labor Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 697–698 (1942). We must not forget that the "question whether the settlement [with the employer] shall be accepted as definitive is

[3] "The Senate amendment followed the present language of the act, which permits the Board to petition for enforcement, but does not require it to do so. The conference agreement adopts the language of the Senate amendment." H. R. Conf. Rep. No. 510, on H. R. 3020, 80th Cong., 1st Sess., p. 55.

for the Board to decide . . . ." *Labor Board* v. *General Motors Corp.*, 179 F. 2d 221, 222 (C. A. 2d Cir. 1950). The employer, who could have obtained review of the Board order when it was entered, § 10 (f), is hardly in a position to object. *Labor Board* v. *Todd Co.*, 173 F. 2d 705 (C. A. 2d Cir. 1949); *Labor Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 134 (C. A. 9th Cir. 1949).

The contrary argument was made in more explicit terms in *Labor Board* v. *Crompton-Highland Mills*, 337 U. S. 217 (1949), a case also coming to us from the Court of Appeals for the Fifth Circuit. The Board's petition for enforcement had been filed more than a year and three months after its order. In its brief in this Court as well as in response to the petition for enforcement in the Court of Appeals, the employer alleged that it had bargained collectively with the Union for nearly two years prior to the petition for enforcement, and that the Board's order requiring collective bargaining should not be enforced. Noting the delay, respondent asked that it be afforded "an opportunity to prove the pertinent facts." The Court of Appeals denied the Board's "belated" petition for enforcement for a reason not pertinent here, coupled with "the earnest assertions by the respondent that it has complied with the Board's previous order . . . ." 167 F. 2d 662, 663 (1948). This Court reversed, holding "that the Board's order to cease and desist is justified, under the circumstances of this case . . . ." The Court stated that "Even though the employer, since January 1, 1946, may have carried on collective bargaining in good faith as to rates of pay and other matters, a decree enforcing the original order against making a general increase without consulting the collective bargaining representatives is justifiable. '. . . an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it

may be less than when made.' *Labor Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271. See also, *Federal Trade Comm'n* v. *Goodyear Tire & Rubber Co.,* 304 U. S. 257." 337 U. S. at 225, n. 7.

We think the rationale of the *Crompton-Highland* case is persuasive here. Otherwise those intent upon violating the Act have a ready means of escape through the use of delaying tactics in negotiation, culminating in the filing of motions for leave to adduce evidence when enforcement is sought, thus effectively frustrating the Board's order. We need not now face the question whether a Court of Appeals may under § 10 (e) refer a matter back to the Board for appropriate action on a showing by the employer that subsequent to the Board's order, but before the petition for enforcement several years later, a rival union has filed before the Board a petition for recognition, not yet acted upon, which claims that the bargaining representative no longer has a majority of the employees. Nor need we decide whether a period of delay through its length alone may mature into a denial of an enforcement decree or make necessary the adduction of additional evidence. Cf. *Labor Board* v. *Eanet,* 85 U. S. App. D. C. 371, 179 F. 2d 15 (C. A. D. C. Cir. 1949). We decide only that in this case the Board's delay in filing its petition was not fatal, and cannot save the order entered below. Like its companion, this order of the Court of Appeals must be vacated and the enforcement of the Board order decreed pursuant to § 10 (e), unless "extraordinary circumstances" are pleaded which justify the respondent's failure to urge its objections before the Board.

It is so ordered.

[For dissenting opinion of Mr. Justice Frankfurter, joined by Mr. Justice Jackson, see *ante,* p. 570.]

BROWN SHOE CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 445. Argued April 5, 1950.—Decided May 15, 1950.

Petitioner corporation received cash and other property from certain community groups as inducements to the location or expansion of petitioner's manufacturing operations in the communities. The cash so received (which was less than the amounts expended for local factory buildings and equipment) was not earmarked or segregated but was deposited in petitioner's general bank account. The values of buildings so received were charged to a building account. Both cash and other property so received were credited to surplus. *Held:* In determining petitioner's excess profits tax, computed by the invested capital method, for the fiscal years ended 1942 and 1943:

1. Under § 113 (a) (8) (B) of the Internal Revenue Code, petitioner was entitled to deductions on account of depreciation on property acquired from community groups or acquired with cash received from such groups, to the extent that the property was acquired after December 31, 1920. *Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98, distinguished. Pp. 589–591.

2. Under § 718 (a) (1) and (2) of the Internal Revenue Code, petitioner may also include the value of such contributions from community groups in equity invested capital. *LaBelle Iron Works* v. *United States,* 256 U. S. 377, distinguished. Pp. 592–593.

175 F. 2d 305, reversed.

The case is stated in the first paragraph of the opinion. The decision below is *reversed,* p. 593.

Charles B. McInnis argued the cause for petitioner. With him on the brief was *Ernest M. Callomon.*

Harry Marselli argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Stanley M. Silverberg, Ellis N. Slack* and *Lee A. Jackson.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This proceeding seeks redetermination of petitioner's excess profits tax, computed by the invested capital method, for the fiscal years ended 1942 and 1943.[1] The issues arise from the payment of cash and the transfer of other property to petitioner by certain community groups as an inducement to the location or expansion of petitioner's factory operations in the communities. Petitioner claimed, and the Commissioner disallowed, (1) a deduction from gross income for depreciation on the property contributed and on the full cost of property acquired in part with contributed cash or equivalent funds, and (2) inclusion of the total value of the contributions in petitioner's equity invested capital. The Tax Court reversed the Commissioner's ruling in part. 10 T. C. 291 (1948). The Court of Appeals for the Eighth Circuit held with the Commissioner on all issues. 175 F. 2d 305 (1949). We granted certiorari, 338 U. S. 909 (1950), in view of an asserted conflict between the decision below and that of the Court of Appeals for the Third Circuit in *Commissioner* v. *McKay Products Corp.*, 178 F. 2d 639 (1949), reversing the Tax Court, 9 T. C. 1082 (1947).

Two questions must be determined: First, whether petitioner in computing its normal-tax net income, which is adjusted in determining excess profits net income, is entitled to deductions for depreciation with respect to property transferred to it from community groups or ac-

[1] The tax in controversy is imposed under the excess profits tax provisions of the Second Revenue Act of 1940, 54 Stat. 974, 975, as amended, I. R. C. § 710 *et seq.* The tax is levied upon excess profits net income remaining after allowance of a $5,000 specific exemption and an excess profits credit representing a normal profit. The Act permitted computation of the credit on the basis either of average income over a base period or of "invested capital," which includes equity invested capital and 50 percent of borrowed capital. The excess profits tax provisions of the Act were repealed in 1945. 59 Stat. 556, 568.

quired with cash to the extent received from such groups. Petitioner contends that the properties so acquired were depreciable as "gifts" under § 113 (a) (2) of the Internal Revenue Code or as "contributions to capital" under § 113 (a) (8) (B) or both; as to the properties acquired with cash it contends alternatively that they had "cost" to the taxpayer under § 113 (a).[2] Second, we must decide whether in computing petitioner's invested capital credit the aggregate value of the assets transferred by the community groups may be included in equity invested capital under § 718 (a) of the Code either as a "contribution to capital" or as "accumulated earnings and profits." [3]

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[2] Section 23 (l) of the Code permits a deduction from gross income for depreciation of property, and § 23 (n) provides that the "basis" for depreciation shall be as provided in § 114, which adopts the "adjusted basis" provided in § 113 (b) for determining gain. This subsection in turn refers to § 113 (a), which provides that the "basis (unadjusted)" shall be the "cost" of the property, with certain exceptions including the following: § 113 (a) (2) provides in relevant part that "If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift . . . ."; § 113 (a) (8) provides that "If the property was acquired after December 31, 1920, by a corporation . . . (B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor . . . ."

[3] Section 718 (a) provided relevantly:

". . . The equity invested capital for any day of any taxable year . . . shall be the sum of the following amounts, reduced as provided in subsection (b)—

"(1) . . . Money previously paid in for stock, or as paid-in surplus, or as a contribution to capital;

"(2) . . . Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. . . .

. . . . . .

"(4) . . . The accumulated earnings and profits as of the beginning of such taxable year . . . ." 54 Stat. 974, 982, 26 U. S. C. (1940 ed.) § 718 (a) (1), (2), (4).

Petitioner is a New York corporation which at all times material conducted manufacturing operations in a number of plants located in Illinois, Indiana, Missouri and Tennessee. From 1914 to 1939 petitioner received in seventeen transactions an aggregate of $885,559.45 in cash and $85,471.56 in buildings[4] from various community groups in twelve towns. Except in one instance, each transfer was pursuant to a written contract between petitioner and the respective community group. The contracts were of three types: The first required petitioner to locate, construct and equip, or enlarge, a factory in the community, to operate the factory "continuously so long as it is practicable in the conduct of its business for at least a period of ten years," and to meet a minimum payroll, in consideration of which the community group agreed to transfer land and cash "to be used for the payment of suitable factory building or buildings"; in one instance existing buildings were also transferred and in another instance only buildings and no cash sum. Under this type of contract petitioner was obligated in the event of noncompliance to transfer the building back to the community group or to repay the sum. Under a second type of agreement petitioner in consideration of a cash payment undertook to enlarge an existing factory and to operate it for a period of ten years with a stipulated minimum addition to personnel. A third type of contract called only for the construction of an addition to petitioner's existing factory in consideration of a cash sum. Contracts of the latter type were in the nature of supplementary agreements with community groups and may have involved an obligation on the part of petitioner to continue operation of the additional plant facilities for the unexpired remainder of a period not

[4] The value of the land upon which the buildings were located was not included in petitioner's books and is unimportant for this proceeding.

exceeding ten years agreed upon in an earlier contract. No restriction was imposed in any instance as to the use which petitioner might make of the property contributed or acquired with cash, or of the proceeds if the property should be disposed of, after expiration of the required period of operation. The Tax Court assumed performance by petitioner according to the terms of the agreements, and the Court of Appeals did not differ. In the case of eleven contracts the stipulated period for performance had expired prior to the taxable years in question.

The single transaction which was not based upon such contractual obligations involved a $10,000 cash bonus paid in 1914, according to the minutes of petitioner's board of directors, "as a part of . . . organization expenses in starting the factory" in the particular town.

The cash sums received by petitioner from the groups were not earmarked for, or held intact and applied against, the plant acquisitions in the respective communities but were deposited in petitioner's general bank account from which were paid general operating expenses and the cost of all assets acquired, including factory buildings and equipment in the towns involved. The cash payments were debited to cash account on the assets side of petitioner's ledger and were credited to earned surplus either upon receipt or after having first been assigned to contributed surplus. The values of the buildings acquired were set up in a building account on the assets side and were credited to surplus.[5] In every instance the cash received by petitioner from a community group was less than the amount expended by it for the acquisition or construction of the local factory building and equipment.

In computing its normal tax net income for the taxable years in controversy petitioner deducted depreciation on

[5] Both courts below and the Commissioner have expressly assumed, as petitioner asserts, that the receipts of property and cash were not taxed as income.

the buildings transferred by the community groups and on the full cost of the buildings and equipment acquired or enlarged in the communities from which it had received cash. Petitioner also included the total of $971,031.01 in cash and other property in its equity invested capital.

The Commissioner disallowed depreciation deductions with respect to the buildings transferred (in the value of $85,471.56) and the properties acquired with cash to the extent paid to petitioner by the groups (in the value of $885,559.45).[6] In computing the amount of depreciation to be allowed, the Commissioner deducted that portion of the cost of the buildings, land and machinery which was paid with such contributed cash or equivalent funds.[7] The Commissioner in making such reductions allocated the cash contribution to each item, such as buildings, land if any had been purchased, and machinery in the proportion of the total cost of such item to the total cost of the project. The Commissioner also disallowed inclusion in equity invested capital of the total assets transferred, reducing such capital as computed by petitioner by $971,031.01.

The Tax Court reversed the Commissioner's disallowance of depreciation with respect to that portion of the acquisitions paid for with cash. It concluded that these items had "cost" and therefore "basis" to petitioner, since they had been paid for from petitioner's own unrestricted funds in which the cash contributions had been deposited without earmarking; as to the buildings transferred, the Court sustained the Commissioner on the ground that these transfers were not gifts and therefore the trans-

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[6] The Commissioner does not deny that such deductions were disallowed for the first time in 1943, following the decision in *Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98 (1943).

[7] The amount thus disallowed on account of depreciation was $22,472.60 for the fiscal year ended 1942 and $24,307.10 for the fiscal year ended 1943. There was no determination by the Commissioner of a deficiency in petitioner's normal tax for either year.

feror's basis was not available to petitioner. It held that the petitioner was in error in recording the contributions in equity invested capital as "contributions to capital" because only stockholders could make such contributions.[8] The Court of Appeals, reversing the Tax Court as to the allowance of depreciation deductions with respect to property acquired with cash, held that to the extent of the contributions there was no cost to petitioner.[9]

We think the assets transferred to petitioner by the community groups represented "contributions to capital" within the meaning of § 113 (a)·(8) (B) and required no reduction in the depreciation basis of the properties acquired.[10] The values which the taxpayer received were additions to "capital" as that term has commonly been understood in both business and accounting practice; [11]

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[8] The Tax Court relied at this point upon *McKay Products Corp.*, 9 T. C. 1082 (1947), which followed *Frank Holton & Co.*, 10 B. T. A. 1317 (1928) and *A. C. F. Gasoline Co.*, 6 B. T. A. 1337 (1927), decided under earlier excess profits tax laws, and *Liberty Mirror Works*, 3 T. C. 1018 (1944), involving I. R. C. § 718. The opinions in *Frank Holton & Co.* and *Liberty Mirror Works* regarded *LaBelle Iron Works* v. *United States*, 256 U. S. 377 (1921), as controlling.

[9] For this result the Court of Appeals cited *Detroit Edison Co.* v. *Commissioner*, 319 U. S. 98 (1943); *Commissioner* v. *Arundel-Brooks Concrete Corp.*, 152 F. 2d 225 (C. A. 4th Cir. 1945); and its own prior decision in *C. L. Downey Co.* v. *Commissioner*, 172 F. 2d 810 (C. A. 8th Cir. 1949). In affirming on the invested capital issue the Court of Appeals relied in part on *LaBelle Iron Works* v. *United States*, note 8 *supra*, and on the *Detroit Edison* case.

[10] See O'Meara, Contributions to Capital by Non-shareholders, 3 Tax L. Rev. 568, 572 (1948).

No suggestion is made by the Commissioner that because the transfers were the subject of contract they were not "contributions" within the statute.

[11] See, *e. g.*, Current Problems in Accounting—Proceedings of the Accounting Institute, 1941, p. 20 (Revised Statement by American Accounting Association of Accounting Principles underlying Corporate Financial Statements); Guthmann and Dougall, Corporate Financial Policy 525 (1940); Harvey, Some Indicia of Capital Transfers under the Federal Income Tax Laws, 37 Mich. L. Rev. 745, 747,

conformably with this usage the pertinent Treasury Regulations have consistently recognized that contributions to capital may originate with persons having no proprietary interest in the business.[12] That this interpretation is in harmony with broad congressional policy as to depreciation deductions was emphasized by the Third Circuit when considering the similar situation presented in *Commissioner* v. *McKay Products Corp., supra,* 178 F. 2d at 643:

> ". . . the assets received . . . are being used by the taxpayer in the operation of its business. They will in time wear out, and if [the taxpayer] is to continue in business, the physical plant must eventually be replaced. Looking as they do toward business continuity, the Internal Revenue Code's depreciation provisions—and especially those which provide for a substituted rather than a cost basis—would seem to envision allowance of a depreciation deduction in situations like this. . . ."

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n. 6 (1939); Marple, Capital Surplus and Corporate Net Worth 12, 136–137 (1936). Cf. Magill, Taxable Income 389 (rev. ed., 1945); 1 Mertens, Law of Federal Income Taxation § 5.14 (1942); *Texas & Pac. R. Co.* v. *United States,* 286 U. S. 285, 289 (1932); *Lykes Bros. S. S. Co., Inc.,* 42 B. T. A. 1395, 1401 (1940), aff'd 126 F. 2d 725, 727 (C. A. 5th Cir. 1942); *Helvering* v. *Claiborne-Annapolis Ferry Co.,* 93 F. 2d 875, 876 (C. A. 4th Cir. 1938).

[12] Treas. Reg. 86, Art. 113 (a) (8)–1; Treas. Reg. 94, Art. 113 (a) (8)–1; Treas. Reg. 101, Art. 113 (a) (8)–1; Treas. Reg. 103, § 19.113 (a) (8)–1; and Treas. Reg. 111, § 29.113 (a) (8)–1 have read in part: "In respect of property acquired by a corporation after December 31, 1920, from a shareholder as paid-in surplus, *or from any person as a contribution to capital,* the basis of the property in the hands of the corporation is the basis which the property would have had in the hands of the transferor if the transfer had not been made. . . ." The provision of § 113 (a) (8) (B), Revenue Act of 1932, in which the term "contribution to capital" first appeared in federal revenue legislation, was reenacted without change in the Act of 1934 and, following the above interpretation in the regulations, in the Acts of 1936 and 1938 and in the Internal Revenue Code.

The Commissioner contends, however, that this conclusion was foreclosed by *Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98 (1943). That decision denied inclusion in the base for depreciation of electric power lines the amount of payments received by the electric company for construction of the line extensions to the premises of applicants for service. It was held that to the extent of such payments the electric lines did not have cost to the taxpayer, and that such payments were neither gifts nor contributions to the taxpayer's capital. We do not consider that case controlling on the issue whether contributions to capital are involved here. Because in the *Detroit Edison* case "The payments were to the customer the price of the service," the Court concluded that "it overtaxes imagination to regard the farmers and other customers who furnished these funds as makers either of donations or contributions to the Company." Since in this case there are neither customers nor payments for service, we may infer a different purpose in the transactions between petitioner and the community groups. The contributions to petitioner were provided by citizens of the respective communities who neither sought nor could have anticipated any direct service or recompense whatever, their only expectation being that such contributions might prove advantageous to the community at large. Under these circumstances the transfers manifested a definite purpose to enlarge the working capital of the company.[13]

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[13] *Commissioner* v. *Arundel-Brooks Concrete Corp.*, 152 F. 2d 225 (C. A. 4th Cir. 1945), relied upon by the court below, involved only the issue whether the full cost of a concrete mixing plant, the construction of which was financed in part by payments from a nearby supplier of a raw material used in mixing concrete, was depreciable to the taxpayer; there was no "contribution to capital" issue, the only question being one of cost basis. However, the payments in that case were made in consideration of services rendered. The construction of the concrete plant directly benefited the supplier of raw materials by insuring the use of its sole product by the tax-

The assets transferred by the community groups are likewise contributions to petitioner's capital for the purpose of computing its invested capital credit.[14] Cf. I. R. C. § 728. Precisely the same interpretation has been placed by the relevant Treasury Regulations upon the term "contribution to capital" appearing in § 718 (a) as upon the like expression in the income tax provisions.[15] That the excess profits tax provision characterizes capital contributions as being "invested" and "paid in" does not indicate, as the Commissioner urges, that the concept of capital is the constricted one of legal capital or capital originating with persons having a proprietary interest in the business; we think instead that the taxpayer's investment includes certain values which are properly "treated as his investment," cf. *Reisinger* v. *Commissioner,* 144 F. 2d 475, 477–478 (C. A. 2d Cir. 1944), though not having cost to the taxpayer. Cf. I. R. C. § 723. It would have been an oddity for Congress to make the inclusion of actual capital contributions in equity invested capital turn upon whether the transferor owned or failed to own one or two shares of stock in the corporation at the time of the transfer.[16]

The decision of this Court in *LaBelle Iron Works* v. *United States,* 256 U. S. 377 (1921), is not to the contrary. That case was decided under the excess profits tax law of 1917 in which "invested capital" was defined

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payer; the supplier was also served through a business affiliation with the parent of the wholly owned taxpayer in the form of an exclusive marketing arrangement which saved the supplier the expense of a sales organization. See *Arundel-Brooks Concrete Corp.* v. *Commissioner,* 129 F. 2d 762 (C. A. 4th Cir. 1942).

[14] See Brewster, The Federal Excess Profits Tax 110–111 (1941).

[15] Treas. Reg. 109, § 30.718–1; Treas. Reg. 112, § 35.718–1.

The Commissioner agrees that the term "contribution to capital" is used with the same meaning in §§ 113 (a) (8) (B) and 718 (a).

[16] See 2 Montgomery's Federal Taxes—Corporations and Partnerships—1946–47, p. 372.

as "(1) Actual cash paid in, (2) the actual cash value of tangible property paid in other than cash, for stock or shares . . . at the time of such payment . . . and (3) paid in or earned surplus and undivided profits used or employed in the business . . . ." The Court held that neither unearned appreciation in value of the taxpayer's ore lands nor the surrender of old stock in exchange for new issues based upon that value, could be regarded as "the actual cash value of tangible property paid in other than cash" or as "paid in or earned surplus and undivided profits." The includability of contributions by outsiders in invested capital was not passed upon.[17]

To the extent that petitioner acquired property involved in this controversy after December 31, 1920, it is entitled to deductions on account of depreciation under § 113 (a) (8) (B). It also may include the value of the contributions from community groups in equity invested capital under § 718 (a) (1) and (2). The judgment of the Court of Appeals is reversed and the case remanded with directions to remand to the Tax Court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE BLACK agrees with the Court of Appeals and would affirm its judgment.

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[17] In *Southern Pac. Co.* v. *Edwards,* 57 F. 2d 891 (S. D. N. Y. 1932), the court held that a capital donation originating with a non-stockholder was includable in invested capital as "paid-in surplus" under the 1917 Act. However, contributions to capital account from outsiders are often thought of as contributed or donated capital surplus rather than as paid-in surplus, see *e. g.,* Hoagland, Corporation Finance 555 (3d ed. 1947); we think that for this reason among others Congress added the term "contribution to capital" to the excess profits tax provisions of the 1940 Act, as it had to the Revenue Acts (§ 113 (a) (8)) since 1932, to indicate that contributions from outsiders intended as additions to capital should be included in the computation. See S. Rep. No. 665, 72d Cong., 1st Sess. 27–28 (1932); H. R. Rep. No. 1492, 72d Cong., 1st Sess. 13 (1932).

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EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL. *v.* MYTINGER & CASSELBERRY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 568. Argued April 19–20, 1950.—Decided May 29, 1950.

Section 304 (a) of the Federal Food, Drug, and Cosmetic Act, as amended, permits multiple seizures of misbranded articles "when the Administrator has probable cause to believe from facts found, without hearing, . . . that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer." Upon the Administrator's finding, without a hearing, of probable cause to believe that the labeling of a vitamin product distributed by the appellee in interstate commerce was "misleading to the injury or damage of the purchaser or consumer," eleven seizures of the product were made and as many libel suits instituted over a four-month period. There was no claim that the product was harmful or dangerous to health. Appellee brought suit in the Federal District Court to have the multiple seizure provision of § 304 (a) declared unconstitutional and to dismiss all except the first libel suit. *Held:*

1. The Due Process Clause of the Fifth Amendment does not require that there be afforded a hearing in connection with the administrative determination to make multiple seizures, but is satisfied by the opportunity which the claimant has for a full hearing before the court in the libel proceedings. Pp. 598–600.

(a) In making the finding here involved, the administrative agency was merely determining whether a judicial proceeding should be instituted, subject to final determination by the Attorney General. Pp. 598–599.

(b) Where only property rights are involved, the requirements of due process are satisfied if there is an opportunity for a hearing and a judicial determination at some stage. Pp. 599–600.

2. The District Court had no jurisdiction to review the administrative determination of probable cause. Pp. 600–602.

3. The fact that the preparation here involved is not dangerous to health does not require a different result, since the statutory scheme treats every "misbranded article" the same in this respect—whether it is "dangerous to health," or its labeling is "fraudulent" or materially "misleading to the injury or damage of the purchaser or consumer." P. 601.

4. Consolidation of the libel suits so that one trial may be had is the relief against multiplicity of suits afforded by the statute to the claimant of the seized goods. P. 602.

87 F. Supp. 650, reversed.

In a suit brought by the appellee, the District Court enjoined the enforcement of the multiple seizure provision of § 304 (a) of the Federal Food, Drug, and Cosmetic Act, as violative of the Due Process Clause of the Fifth Amendment of the Federal Constitution. 87 F. Supp. 650. On direct appeal to this Court, *reversed,* p. 602.

Robert L. Stern argued the cause for appellants. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Philip Elman, Vincent A. Kleinfeld* and *William W. Goodrich.*

Charles S. Rhyne argued the cause for appellee. With him on the brief were *Lester L. Lev* and *J. E. Simpson.*

Mr. Justice Douglas delivered the opinion of the Court.

This is an appeal [1] from a three-judge District Court specially constituted on appellee's application for an injunction to restrain enforcement of a portion of an Act of Congress for repugnance to the Due Process Clause of the Fifth Amendment.[2]

Section 304 (a) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1044, 21 U. S. C. § 334 (a), as amended, 62 Stat. 582, 21 U. S. C. (Supp. III) § 334 (a), permits multiple seizures of misbranded articles "when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading

[1] 62 Stat. 928, 961, 28 U. S. C. §§ 1253, 2101.

[2] 62 Stat. 968, 28 U. S. C. §§ 2282, 2284.

to the injury or damage of the purchaser or consumer." [3]

Appellee is the exclusive national distributor of Nutrilite Food Supplement, an encapsulated concentrate of alfalfa, water cress, parsley, and synthetic vitamins combined in a package with mineral tablets. There is no claim that the ingredients of the preparation are harmful or dangerous to health. The sole claim is that the labeling was, to use the statutory words, "misleading to the injury or damage of the purchaser or consumer" and that therefore the preparation was "misbranded" when introduced into interstate commerce.

This was indeed the administrative finding behind eleven seizures resulting in that number of libel suits, between September and December, 1948. The misbranding, it was found, resulted from the booklet which

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[3] The provision of which the quoted portion is a part reads as follows:

"Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 404 or 505, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however,* That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitation shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

accompanied the preparation.[4] Shortly thereafter the present suit was instituted to have the multiple seizure provision of § 304 (a) declared unconstitutional and to

[4] The booklet, *How to Get Well and Stay Well*, is used by salesmen in soliciting prospective customers. A version of the booklet in use in 1947 represented that Nutrilite had "cured or greatly helped" such "common ailments" as "Low blood pressure, Ulcers, Mental depression, Pyorrhea, Muscular twitching, Rickets, Worry over small things, Tonsilitis, Hay Fever, Sensitiveness to noise, Underweight, Easily tired, Gas in Stomach, Cuts heal slowly, Faulty vision, Headache, Constipation, Anemia, Boils, Flabby tissues, Hysterical tendency, Eczema, Overweight, Faulty memory, Lack of ambition, Certain bone conditions, Nervousness, Nosebleed, Insomnia (sleeplessness), Allergies, Asthma, Restlessness, Bad skin color, Poor appetite, Biliousness, Neuritis, Night blindness, Migraine, High blood pressure, Sinus trouble, Lack of concentration, Dental caries, Irregular heartbeat, Colitis, Craving for sour foods, Arthritis (rheumatism), Neuralgia, Deafness, Subject to colds." This version is the basis for an indictment now pending in the Southern District of California charging Lee S. Mytinger and William S. Casselberry with the misbranding of Nutrilite in violation of the Federal Food, Drug, and Cosmetic Act.

After a hearing prior to the indictment, appellee revised the booklet. Direct curative claims were eliminated. But pages 41–52 of the revised booklet were devoted to case histories explaining that Nutrilite brought relief from such ailments as diabetes, feebleminded-ness, stomach pains, sneezing and weeping. Appellant Crawford, Associate Commissioner of Food and Drugs, concluded that there was probable cause to believe and that he did believe that this version of the booklet was misleading. On September 28 and 30, 1948, he recommended seizures of Nutrilite shipments.

Appellee thereafter ordered its salesmen to remove pages 37–58 which contained the case histories. The pages which remained pointed to the dangers and prevalence of illness, described the discovery of Nutrilite, and recommended the booklet to those who wanted to get well and stay well. On December 2, 1948, appellant Larrick, Assistant Commissioner of Foods and Drugs, made a probable cause determination on these pages of the booklet and recommended seizure.

Six new pages were thereafter added to the booklet. On December 9, 1948, appellant Dunbar, Commissioner of Foods and Drugs, made a probable cause determination on that version of the booklet and recommended further seizures.

dismiss all libel cases except the first one instituted. The District Court held that appellants had acted arbitrarily and capriciously in violation of the Fifth Amendment in instituting multiple libel suits without first affording the appellee a hearing on the probable cause issue; that the multiple seizure provision of § 304 (a) was unconstitutional under the Due Process Clause of the Fifth Amendment; and that appellants should be permanently enjoined from instituting any action raising a claim that the booklet accompanying the preparation was a misbranding since it was not fraudulent, false, or misleading. 87 F. Supp. 650.

First. The administrative finding of probable cause required by § 304 (a) is merely the statutory prerequisite to the bringing of the lawsuit. When the libels are filed the owner has an opportunity to appear as a claimant and to have a full hearing before the court.[5] This hearing, we conclude, satisfies the requirements of due process.

At times a preliminary decision by an agency is a step in an administrative proceeding. We have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective. See *Lichter* v. *United States,* 334 U. S. 742; *Inland Empire Council* v. *Millis,* 325 U. S. 697; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126.

But this case does not go as far. Here an administrative agency is merely determining whether a judicial proceeding should be instituted. Moreover, its finding of probable cause, while a necessary prerequisite to multiple seizures, has no effect in and of itself. All pro-

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[5] Sec. 304 (b) provides in part:

"The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury."

ceedings for the enforcement of the Act or to restrain violations of it must be brought by and in the name of the United States. § 307. Whether a suit will be instituted depends on the Attorney General, not on the administrative agency. He may or may not accept the agency's recommendation. If he does, seizures are made and libels are instituted. But the seizures and suits are dependent on the discretion of the Attorney General.

It is said that these multiple seizure decisions of the Administrator can cause irreparable damage to a business. And so they can. The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial. See *Beavers* v. *Henkel,* 194 U. S. 73, 85; *Ex parte United States,* 287 U. S. 241, 250. The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. The harm to property and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. *Phillips* v. *Commissioner,* 283 U. S. 589, 596–597; *Bowles* v. *Willingham,* 321 U. S. 503, 520; *Yakus* v. *United States,* 321 U. S. 414, 442–443.

One of the oldest examples is the summary destruction of property without prior notice or hearing for the pro-

tection of public health. There is no constitutional reason why Congress in the interests of consumer protection may not extend that area of control. It may conclude, as it did here, that public damage may result even from harmless articles if they are allowed to be sold as panaceas for man's ills. A requirement for a hearing, as a matter of constitutional right, does not arise merely because the danger of injury may be more apparent or immediate in the one case than in the other. For all we know, the most damage may come from misleading or fraudulent labels. That is a decision for Congress, not for us. The decision of Congress was that the administrative determination to make multiple seizures should be made without a hearing. We cannot say that due process requires one at that stage.

Second. The District Court had no jurisdiction to review the administrative determination of probable cause.

The determination of probable cause in and of itself had no binding legal consequence any more than did the final valuation made by the Interstate Commerce Commission in *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299. It took the exercise of discretion on the part of the Attorney General, as we have pointed out above, to bring it into play against appellee's business. Judicial review of such a preliminary step in a judicial proceeding is so unique that we are not willing easily to infer that it exists.

Judicial review of this preliminary phase of the administrative procedure does not fit the statutory scheme nor serve the policy of the Act. Congress made numerous administrative determinations under the Act reviewable by the courts.[6] But it did not place the finding of probable cause under § 304 (a) in that category. This highly

[6] Review of an order of the Administrator refusing to permit an application for a new drug to become effective or suspending the effectiveness of an application is authorized in § 505 (h), 21 U. S. C. § 355 (h). Orders of the Administrator in connection with issuing,

selective manner in which Congress has provided for judicial review reinforces the inference that the only review of the issue of probable cause which Congress granted was the one provided in the libel suit. Cf. *Switchmen's Union* v. *Board,* 320 U. S. 297, 305–306.

The purpose of the multiple seizure provision is plain. It is to arrest the distribution of an article that is dangerous, or whose labeling is fraudulent or misleading, pending a determination of the issue of adulteration or misbranding. The public therefore has a stake in the jurisdictional issue before us. If the District Court can step in, stay the institution of seizures, and bring the administrative regulation to a halt until it hears the case, the public will be denied the speedy protection which Congress provided by multiple seizures. It is not enough to say that the vitamin preparation in the present case is not dangerous to health. This preparation may be relatively innocuous. But the statutory scheme treats every "misbranded article" the same in this respect—whether it is "dangerous to health," or its labeling is "fraudulent," or materially "misleading to the injury or damage of the purchaser or consumer." [7] What we do today determines the jurisdiction of the District Court in all the cases in that category. If the court in the present case can halt all multiple seizures but one, so can the court in other cases. The means which Congress provided to protect consumers against the injurious consequences of protracted proceedings would then be seriously impaired. Congress weighed the potential injury to the public from misbranded articles against the injury to the purveyor of the article from a temporary interference with its distribution and decided in favor of the speedy, preventive device of multiple seizures. We would impair or destroy the effectiveness

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amending, or repealing regulations under §§ 401, 403 (j), 404 (a), 406 (a) and (b), 501 (b), 502 (d), 502 (h), 504, 604 are expressly made reviewable by § 701 (e) and (f), 21 U. S. C. § 371 (e) and (f).

[7] See § 304 (a) note 3, *supra.*

of that device if we sanctioned the interference which a grant of jurisdiction to the District Court would entail. Multiple seizures are the means of protection afforded the public. Consolidation of all the libel suits so that one trial may be had [8] is the relief afforded the distributors of the articles.[9]

Reversed.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, dissenting.

While I agree with the Court as to the constitutional and statutory issues canvassed in its opinion, I am unable

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[8] Sec. 304 (b) provides in part:

"When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby."

[9] Congress has granted distributors through the provision for consolidation of all libel suits the measure of relief which courts at times grant through a stay of multiple actions. See *Landis* v. *North American Co.*, 299 U. S. 248.

to answer MR. JUSTICE JACKSON'S dissent, and I must therefore yield to it.

Of course Congress may constitutionally vest judicially unreviewable discretion in an executive agency to initiate multiple suits in order to stop trafficking in pernicious drugs or even in those that are harmless, where efficacy is misrepresented. I agree that it has done so in the Federal Food, Drug, and Cosmetic Act of 1938. 52 Stat. 1040, 21 U. S. C. § 301 *et seq.* But it does not at all follow that Congress has thereby cut off the right of access to the courts to prove that the enforcing agency has not acted within the broadest bounds of fair discretion, rare as the occasion may be for such an attempt and however improbable its success.

Such I understand to be the nature of the proceedings below and such the basis of the District Court's decree. Unless we can say, as I cannot, that the findings in support of it have no support in the evidence, we should not hold that the court below was without jurisdiction to entertain the suit.

The limited claim which the District Court sustained falls precisely within the qualification left open by this Court in a leading case sustaining the power of Congress to vest unreviewable discretion in executive agencies. When the Court was urged to deny this power of Congress and "extreme cases" were put showing "how reckless and arbitrary might be the action of Executive officers," the Court made this answer:

> "It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental

> principles devised for the protection of the essential rights of property." *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 195.

Mr. Justice Harlan, speaking for the Court, cast its thought in the language current at the time. But the thought behind the words is not outmoded and controls, I believe, the case before us.

MR. JUSTICE JACKSON, dissenting.

The Court does not deal at all with what appears to be the ultimate issue decided by the court below.

The trial court of three judges wrote no opinion but made forty-three detailed findings of fact which would require twenty of these printed pages to reproduce and which summarize a 1,500-page record of a long trial. Those findings are made largely on undisputed evidence and on evidence from government sources. This Court does not criticize or reverse any of them.

The substance of these is to find that the Government instituted a multiplicity of court actions, with seizures in widely separated parts of the country, with a purpose to harass appellee and its dealers and intending that these actions and the attendant publicity would injure appellee's business *before any of the issues in such cases could be tried.* This, the court held, was justified by no emergency, the product being, at worst, harmless and having been marketed for years with knowledge of the Department.

Assuming as I do that the Act on its face is not constitutionally defective, the question remains whether it has been so misused by refusal of administrative hearing, together with such irreparable injury in anticipation of judicial hearing, as to deny appellee due process of law or to amount to an abuse of process of the courts.

The Government has sought and received from this Court protection against a multiplicity of suits under

circumstances where injury was less apparent than in this. *Landis* v. *North American Co.*, 299 U. S. 248. The holding of the court below and the contention of the appellee here that the Government is not entitled to so apply the statute as to bring multiple actions designed to destroy a business before it can be heard in its own defense is not frivolous, to say the least.

I am constrained to withhold assent to a decision that passes in silence what I think presents a serious issue.

GRAVER TANK & MFG. CO., INC. ET AL. *v.* LINDE AIR PRODUCTS CO.

ON REHEARING.

No. 2. Argued March 30, 1950.—Decided May 29, 1950.

1. This Court affirms the finding of the two courts below that, under the doctrine of equivalents, certain flux claims of Jones patent No. 2,043,960, for an electric welding process and for fluxes, or compositions, to be used therewith were infringed. Pp. 606–612.
2. The essence of the doctrine of equivalents is that one may not practice a fraud on a patent. P. 608.
3. The doctrine of equivalents is founded on the theory that, if two devices do the same work in substantially the same way and accomplish substantially the same result, they are the same, even though they differ in name, form or shape. Pp. 608–609.
4. In determining equivalents, consideration must be given to the purpose for which an ingredient is used in a patent, the qualities it has when combined with other ingredients, the functions which it is intended to perform, and whether persons reasonably skilled in the art would have known of the interchangeability of an ingredient not contained in the patent with one that was. P. 609.
5. A finding of equivalence is a determination of fact to be made by the trial court; and the trial court's decision should not be disturbed unless clearly erroneous. Pp. 609–610.
6. On the record in this case, involving a claim of a combination of alkaline earth metal silicate and calcium fluoride, the trial court was justified in finding that the substitution in the accused composition of manganese silicate (which is not an alkaline earth metal

silicate) for magnesium silicate (which is an alkaline earth metal silicate), where the two compositions were substantially identical in operation and result, was so insubstantial, in view of the technology and the prior art, that the patent was infringed under the doctrine of equivalents. Pp. 610–612.

The history of the case is summarized in the first paragraph of the opinion. On the aspect of the case involved in the rehearing, *the prior decision of this Court is adhered to,* p. 612.

Thomas V. Koykka argued the cause for petitioners. With him on the brief were *John F. Oberlin, Ashley M. Van Duzer, James R. Stewart* and *Charles L. Byron.*

John T. Cahill and *Richard R. Wolfe* argued the cause for respondent. With them on the brief were *James A. Fowler, Jr.* and *Loftus E. Becker.*

Mr. Justice Jackson delivered the opinion of the Court.

Linde Air Products Co., owner of the Jones patent for an electric welding process and for fluxes to be used therewith, brought an action for infringement against Lincoln and the two Graver companies. The trial court held four flux claims valid and infringed and certain other flux claims and all process claims invalid. 75 U. S. P. Q. 231. The Court of Appeals affirmed findings of validity and infringement as to the four flux claims but reversed the trial court and held valid the process claims and the remaining contested flux claims. 167 F. 2d 531. We granted certiorari, 335 U. S. 810, and reversed the judgment of the Court of Appeals insofar as it reversed that of the trial court, and reinstated the District Court decree. 336 U. S. 271. Rehearing was granted, limited to the question of infringement of the four valid flux claims and to the applicability of the doctrine of equivalents to findings of fact in this case. 337 U. S. 910.

At the outset it should be noted that the single issue before us is whether the trial court's holding that the four flux claims have been infringed will be sustained. Any issue as to the validity of these claims was unanimously determined by the previous decision in this Court and attack on their validity cannot be renewed now by reason of limitation on grant of rehearing. The disclosure, the claims, and the prior art have been adequately described in our former opinion and in the opinions of the courts below.

In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claim. If accused matter falls clearly within the claim, infringement is made out and that is the end of it.

But courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for—indeed encourage—the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law. One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system.

The doctrine of equivalents evolved in response to this experience. The essence of the doctrine is that one may not practice a fraud on a patent. Originating almost a century ago in the case of *Winans* v. *Denmead,* 15 How. 330, it has been consistently applied by this Court and the lower federal courts, and continues today ready and available for utilization when the proper circumstances for its application arise. "To temper unsparing logic and prevent an infringer from stealing the benefit of an invention" [1] a patentee may invoke this doctrine to proceed against the producer of a device "if it performs substantially the same function in substantially the same way to obtain the same result." *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 42. The theory on which it is founded is that "if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape." *Machine Co.* v. *Murphy,* 97 U. S. 120, 125. The doctrine operates not only in favor of the patentee of a pioneer or primary invention, but also for the patentee of a secondary invention consisting of a combination of old ingredients which produce new and useful results, *Imhaeuser* v. *Buerk,* 101 U. S. 647, 655, although the area of equivalence may vary under the circumstances. See *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U. S. 405, 414–415, and cases cited; *Seymour* v. *Osborne,* 11 Wall. 516, 556; *Gould* v. *Rees,* 15 Wall. 187, 192. The wholesome realism of this doctrine is not always applied in favor of a patentee but is sometimes used against him. Thus, where a device is so far changed in principle from a patented article that it performs the same or a similar function in a substantially different way, but nevertheless falls within the

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[1] L. Hand in *Royal Typewriter Co.* v. *Remington Rand,* 168 F. 2d 691, 692.

literal words of the claim, the doctrine of equivalents may be used to restrict the claim and defeat the patentee's action for infringement. *Westinghouse* v. *Boyden Power Brake Co.*, 170 U. S. 537, 568. In its early development, the doctrine was usually applied in cases involving devices where there was equivalence in mechanical components. Subsequently, however, the same principles were also applied to compositions, where there was equivalence between chemical ingredients. Today the doctrine is applied to mechanical or chemical equivalents in compositions or devices. See discussions and cases collected in 3 Walker on Patents (Deller's ed. 1937) §§ 489–492; Ellis, Patent Claims (1949) §§ 59–60.

What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case. Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum. It does not require complete identity for every purpose and in every respect. In determining equivalents, things equal to the same thing may not be equal to each other and, by the same token, things for most purposes different may sometimes be equivalents. Consideration must be given to the purpose for which an ingredient is used in a patent, the qualities it has when combined with the other ingredients, and the function which it is intended to perform. An important factor is whether persons reasonably skilled in the art would have known of the interchangeability of an ingredient not contained in the patent with one that was.

A finding of equivalence is a determination of fact. Proof can be made in any form: through testimony of experts or others versed in the technology; by documents, including texts and treatises; and, of course, by the disclosures of the prior art. Like any other issue of fact, final determination requires a balancing of credibility,

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persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. Particularly is this so in a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience.

In the case before us, we have two electric welding compositions or fluxes: the patented composition, Unionmelt Grade 20, and the accused composition, Lincolnweld 660. The patent under which Unionmelt is made claims essentially a combination of alkaline earth metal silicate and calcium fluoride; Unionmelt actually contains, however, silicates of calcium and magnesium, two alkaline earth metal silicates. Lincolnweld's composition is similar to Unionmelt's, except that it substitutes silicates of calcium and manganese—the latter not an alkaline earth metal—for silicates of calcium and magnesium. In all other respects, the two compositions are alike. The mechanical methods in which these compositions are employed are similar. They are identical in operation and produce the same kind and quality of weld.

The question which thus emerges is whether the substitution of the manganese which is not an alkaline earth metal for the magnesium which is, under the circumstances of this case, and in view of the technology and the prior art, is a change of such substance as to make the doctrine of equivalents inapplicable; or conversely, whether under the circumstances the change was so insubstantial that the trial court's invocation of the doctrine of equivalents was justified.

Without attempting to be all-inclusive, we note the following evidence in the record: Chemists familiar with the two fluxes testified that manganese and magnesium were similar in many of their reactions (R. 287, 669). There is testimony by a metallurgist that alkaline earth

metals are often found in manganese ores in their natural state and that they serve the same purpose in the fluxes (R. 831–832); and a chemist testified that "in the sense of the patent" manganese could be included as an alkaline earth metal (R. 297). Much of this testimony was corroborated by reference to recognized texts on inorganic chemistry (R. 332). Particularly important, in addition, were the disclosures of the prior art, also contained in the record. The Miller patent, No. 1,754,566, which preceded the patent in suit, taught the use of manganese silicate in welding fluxes (R. 969, 971). Manganese was similarly disclosed in the Armor patent, No. 1,467,825, which also described a welding composition (R. 1346). And the record contains no evidence of any kind to show that Lincolnweld was developed as the result of independent research or experiments.

It is not for this Court to even essay an independent evaluation of this evidence. This is the function of the trial court. And, as we have heretofore observed, "To no type of case is this . . . more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations. This trial occupied some three weeks, during which, as the record shows, the trial judge visited laboratories with counsel and experts to observe actual demonstrations of welding as taught by the patent and of the welding accused of infringing it, and of various stages of the prior art. He viewed motion pictures of various welding operations and tests and heard many experts and other witnesses." 336 U. S. 271, 274–275.

The trial judge found on the evidence before him that the Lincolnweld flux and the composition of the patent in suit are substantially identical in operation and in result. He found also that Lincolnweld is in all respects equivalent to Unionmelt for welding purposes. And he concluded that "for all practical purposes, manganese silicate

can be efficiently and effectually substituted for calcium and magnesium silicates as the major constituent of the welding composition." These conclusions are adequately supported by the record; certainly they are not clearly erroneous.[2]

It is difficult to conceive of a case more appropriate for application of the doctrine of equivalents. The disclosures of the prior art made clear that manganese silicate was a useful ingredient in welding compositions. Specialists familiar with the problems of welding compositions understood that manganese was equivalent to and could be substituted for magnesium in the composition of the patented flux and their observations were confirmed by the literature of chemistry. Without some explanation or indication that Lincolnweld was developed by independent research, the trial court could properly infer that the accused flux is the result of imitation rather than experimentation or invention. Though infringement was not literal, the changes which avoid literal infringement are colorable only. We conclude that the trial court's judgment of infringement respecting the four flux claims was proper, and we adhere to our prior decision on this aspect of the case.

Affirmed.

MR. JUSTICE MINTON took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

I heartily agree with the Court that "fraud" is bad, "piracy" is evil, and "stealing" is reprehensible. But in

[2] Rule 52 (a), Federal Rules of Civil Procedure, provides in part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

this case, where petitioners are not charged with any such malevolence, these lofty principles do not justify the Court's sterilization of Acts of Congress and prior decisions, none of which are even mentioned in today's opinion.

The only patent claims involved here describe respondent's product as a flux "containing a major proportion of alkaline earth metal silicate." The trial court found that petitioners used a flux "composed principally of manganese silicate." Finding also that "manganese is not an alkaline earth metal," the trial court admitted that petitioners' flux did not "literally infringe" respondent's patent. Nevertheless it invoked the judicial "doctrine of equivalents" to broaden the claim for "alkaline earth metals" so as to embrace "manganese." On the ground that "the fact that manganese is a proper substitute . . . is fully disclosed in the specification" of respondent's patent, it concluded that "no determination need be made whether it is a known chemical fact *outside* the teachings of the patent that manganese is an equivalent . . . ." Since today's affirmance unquestioningly follows the findings of the trial court, this Court necessarily relies on what the specifications revealed.[1] In so doing, it violates a direct mandate of Congress without even discussing that mandate.

R. S. § 4888, as amended, 35 U. S. C. § 33, provides that an applicant "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." We have held in this very case that this statute precludes invoking the specifications to alter a claim free from ambiguous language, since "it is the claim which measures the grant

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[1] For this reason the tidbits of evidence painstakingly selected from the record by this Court have no significance, since the trial court avowedly did not look beyond the specifications themselves.

to the patentee." [2] *Graver Mfg. Co.* v. *Linde Co.,* 336 U. S. 271, 277. What is not specifically claimed is dedicated to the public. See, *e. g., Miller* v. *Brass Co.,* 104 U. S. 350, 352. For the function of claims under R. S. § 4888, as we have frequently reiterated, is to exclude from the patent monopoly field all that is not specifically claimed, whatever may appear in the specifications. See, *e. g., Marconi Wireless Co.* v. *United States,* 320 U. S. 1, 23, and cases there cited. Today the Court tacitly rejects those cases. It departs from the underlying principle which, as the Court pointed out in *White* v. *Dunbar,* 119 U. S. 47, 51, forbids treating a patent claim "like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. . . . The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms." Giving this patentee the benefit of a grant that it did not precisely claim is no less "unjust to the public" and no less an evasion of R. S. § 4888 merely because done in the name of the "doctrine of equivalents."

In seeking to justify its emasculation of R. S. § 4888 by parading potential hardships which literal enforcement might conceivably impose on patentees who had for some reason failed to claim complete protection for their discoveries, the Court fails even to mention the program for alleviation of such hardships which Congress itself

[2] This Court's approval of the trial judge's resort to specifications is ironic as well as unfortunate. In its original opinion this Court rejected respondent's contention that the very language invoked here to support infringement should be applied to validate a claim otherwise too broad to be upheld. 336 U. S. 271, 277.

has provided. 35 U. S. C. § 64 authorizes reissue of patents where a patent is "wholly or partly inoperative" due to certain errors arising from "inadvertence, accident, or mistake" of the patentee. And while the section does not expressly permit a patentee to expand his claim, this Court has reluctantly interpreted it to justify doing so. *Miller* v. *Brass Co.*, 104 U. S. 350, 353–354. That interpretation, however, was accompanied by a warning that "Reissues for the enlargement of claims should be the exception and not the rule." *Id.* at 355. And Congress was careful to hedge the privilege of reissue by exacting conditions. It also entrusted the Patent Office, not the courts, with initial authority to determine whether expansion of a claim was justified,[3] and barred suits for retroactive infringement based on such expansion. Like the Court's opinion, this congressional plan adequately protects patentees from "fraud," "piracy," and "stealing." Unlike the Court's opinion, it also protects businessmen from retroactive infringement suits and judicial expansion of a monopoly sphere beyond that which a patent expressly authorizes. The plan is just, fair, and reasonable. In effect it is nullified by this decision undercutting what

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[3] "This provision was inserted in the law for the purpose of relieving the courts from the duty of ascertaining the exact invention of the patentee by inference and conjecture, derived from a laborious examination of previous inventions, and a comparison thereof with that claimed by him. This duty is now cast upon the Patent Office. There his claim is, or is supposed to be, examined, scrutinized, limited, and made to conform to what he is entitled to. If the office refuses to allow him all that he asks, he has an appeal. But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office, or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct (as they always should be), the patentee, in a suit brought upon the patent, is bound by it. *Merrill* v. *Yeomans*, 94 U. S. 568." *Keystone Bridge Co.* v. *Phoenix Iron Co.*, 95 U. S. 274, 278.

the Court has heretofore recognized as wise safeguards. See *Milcor Steel Co.* v. *Fuller Co.*, 316 U. S. 143, 148. One need not be a prophet to suggest that today's rhapsody on the virtue of the "doctrine of equivalents" will, in direct contravention of the *Miller* case, *supra,* make enlargement of patent claims the "rule" rather than the "exception."

Whatever the merits of the "doctrine of equivalents" where differences between the claims of a patent and the allegedly infringing product are *de minimis,* colorable only, and without substance, that doctrine should have no application to the facts of this case. For the differences between respondent's welding substance and petitioners' claimed flux were not nearly so slight. The claims relied upon here did not involve any mechanical structure or process where invention lay in the construction or method rather than in the materials used. Rather they were based wholly on using particular materials for a particular purpose. Respondent's assignors experimented with several metallic silicates, including that of manganese. According to the specifications (if these are to be considered) they concluded that while several were "more or less efficacious in our process, we prefer to use silicates of the alkaline earth metals." Several of their claims which this Court found too broad to be valid encompassed manganese silicate; the only claims found valid did not. Yet today the Court disregards that crucial deficiency, holding those claims infringed by a composition of which 88.49% by weight is manganese silicate.

In view of the intense study and experimentation of respondent's assignors with manganese silicate, it would be frivolous to contend that failure specifically to include that substance in a precise claim was unintentional. Nor does respondent attempt to give that or any other explanation for its omission. But the similar use of manganese in prior expired patents, referred to in the Court's opinion, raises far more than a suspicion that its elimina-

tion from the valid claims stemmed from fear that its inclusion by name might result in denial or subsequent invalidation of respondent's patent.

Under these circumstances I think petitioners had a right to act on the belief that this Court would follow the plain mandates of Congress that a patent's precise claims mark its monopoly boundaries, and that expansion of those claims to include manganese could be obtained only in a statutory reissue proceeding. The Court's ruling today sets the stage for more patent "fraud" and "piracy" against business than could be expected from faithful observance of the congressionally enacted plan to protect business against judicial expansion of precise patent claims. Hereafter a manufacturer cannot rely on what the language of a patent claims. He must be able, at the peril of heavy infringement damages, to forecast how far a court relatively unversed in a particular technological field will expand the claim's language after considering the testimony of technical experts in that field. To burden business enterprise on the assumption that men possess such a prescience bodes ill for the kind of competitive economy that is our professed goal.

The way specific problems are approached naturally has much to do with the decisions reached. A host of prior cases, to some of which I have referred, have treated the 17-year monopoly authorized by valid patents as a narrow exception to our competitive enterprise system. For that reason, they have emphasized the importance of leaving business men free to utilize all knowledge not preempted by the precise language of a patent claim. *E. g., Sontag Stores Co.* v. *Nut Co.,* 310 U. S. 281, and cases there cited. In the *Sontag* case Mr. Justice McReynolds, speaking for a unanimous Court, said in part: "In the case under consideration the patentee might have included in the application for the original patent, claims broad enough to embrace petitioner's accused machine, but did not.

This 'gave the public to understand' that whatever was not claimed 'did not come within his patent and might rightfully be made by anyone.' " *Id.* at 293.

The Court's contrary approach today causes it to retreat from this sound principle. The damages retroactively assessed against petitioners for what was authorized until today are but the initial installment on the cost of that retreat.

MR. JUSTICE DOUGLAS, dissenting.

The Court applies the doctrine of equivalents in a way which subverts the constitutional and statutory scheme for the grant and use of patents.

The claims of the patent are limited to a flux "containing a major proportion of alkaline earth metal silicate." Manganese silicate, the flux which is held to infringe, is not an alkaline earth metal silicate. It was disclosed in the application and then excluded from the claims. It therefore became public property. See *Mahn* v. *Harwood,* 112 U. S. 354, 361. It was, to be sure, mentioned in the specifications. But the measure of the grant is to be found in the claims, not in the specifications. *Milcor Steel Co.* v. *Fuller Co.,* 316 U. S. 143, 145, 146. The specifications can be used to limit but never to expand the claim. See *McClain* v. *Ortmayer,* 141 U. S. 419, 424.

The Court now allows the doctrine of equivalents to erase those time-honored rules. Moreover, a doctrine which is said to protect against practicing "a fraud on a patent" is used to extend a patent to a composition which could not be patented. For manganese silicate had been covered by prior patents, now expired. Thus we end with a strange anomaly: a monopoly is obtained on an unpatented and unpatentable article.

COMMISSIONER OF INTERNAL REVENUE *v.* KORELL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 384. Argued February 7, 1950.—Decided June 5, 1950.

In 1944, an individual taxpayer purchased at a premium price of $121 certain taxable corporate bonds with a face value of $100 which were then callable at $104. Upon payment of $40, each bond was convertible at the option of the holder into a share of common stock which then had a market value of $163. *Held:* Under § 125 of the Internal Revenue Code, the taxpayer, in his income tax return for 1944, was entitled to deduct, as "amortizable bond premium" on each bond, the difference between the purchase price of $121 and the call price of $104. Pp. 620–628.

(a) The callability and convertibility of these bonds did not remove them from the reach of § 125. Pp. 623–624.

(b) That the premium may have been paid for the conversion privilege, rather than for a higher rate of interest, did not prevent it from being amortizable under § 125. Pp. 624–628.

(c) The term "bond premium" in § 125 means any extra payment, regardless of the reason therefor. P. 627.

176 F. 2d 152, affirmed.

The Commissioner of Internal Revenue disallowed respondent's deduction in his individual income tax return of "amortizable bond premium" under § 125 of the Internal Revenue Code. The Tax Court overruled the Commissioner. 10 T. C. 1001. The Court of Appeals affirmed. 176 F. 2d 152. This Court granted certiorari. 338 U. S. 890. *Affirmed,* p. 628.

Arnold Raum argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Oscar H. Davis.*

Paul L. Peyton argued the cause and filed a brief for respondent.

Nat Schmulowitz and *Peter S. Sommer* filed a brief for Shoong et al., as *amici curiae,* supporting respondent.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

The tax consequences of a purchase of convertible bonds are in issue here. In August, 1944, respondent, an individual taxpayer, purchased certain American Telephone and Telegraph Company bonds, each having a face value of $100, at a premium price averaging slightly in excess of $121. Each bond was convertible into a share of common stock, at the option of the bondholder, upon the payment of $40. The market price of the stock was over $163 when respondent made his bond purchases. The bonds were callable prior to maturity date according to a schedule appearing in the indenture; had the corporation given appropriate notice at the dates of respondent's purchases, the bonds would have been redeemed at $104.

In his 1944 income tax return, respondent claimed a deduction in excess of $8,600 for amortizable bond premium. He computed his deduction on each bond as the difference between his purchase price, $121, and the call price, $104. This computation is concededly correct if the deduction is allowable. The Commissioner of Internal Revenue, petitioner here, refused to allow any such deduction. His theory was that § 125 of the Internal Revenue Code establishing the deduction for "amortizable bond premium" did not include premium paid for the conversion privilege. A contrary view of the statute was adopted by the Tax Court. 10 T. C. 1001 (1948). The court below affirmed, holding that respondent was entitled to the amortization deduction. 176 F. 2d 152 (1949). We granted certiorari, 338 U. S. 890 (1949), to resolve

the conflict between the decision below and that of the Court of Appeals for the Ninth Circuit in *Commissioner* v. *Shoong,* 177 F. 2d 131 (1949).

Prior to 1942, bond premium was irrelevant for tax purposes. Whether or not the purchase price exceeded the face value of the bond, the holder considered the full price as the basis for capital gain or loss, and reported all taxable interest received as income.[1] In presenting its 1942 tax proposals, however, the Treasury adopted the view that each receipt of interest is not entirely income but is partially a restoration of capital. Its spokesman pointed to the consequent discrimination against holders of taxable bonds: they were being taxed on a return of capital, while holders of tax-exempt bonds were not.[2] To remedy this inequity, the Treasury recommended that amortization of premium be permitted in the case of taxable bonds, and that the basis for capital gain or loss for all bonds be adjusted by the amount of deduction allowable for taxables and disallowable for tax-exempts. These recommendations were ultimately included in the Revenue Act of 1942, 56 Stat. 798, 822, as §§ 113 and 125 of the Internal Revenue Code.

Section 125 contains four subsections.[3] In (a), the general rule is established, applicable "In the case of any

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[1] *New York Life Ins. Co.* v. *Edwards,* 271 U. S. 109, 116 (1926); cf. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 561 (1932).

[2] Statement of Randolph Paul, then Tax Adviser to the Secretary of the Treasury and subsequently General Counsel of the Department, 1 Hearings before House Committee on Ways and Means on Revenue Revisions of 1942, 77th Cong., 2d Sess. 90 (1942).

[3] Int. Rev. Code § 125, titled "Amortizable Bond Premium," reads as follows:

"(a) *General rule.* In the case of any bond, as defined in subsection (d), the following rules shall apply to the amortizable bond premium (determined under subsection (b)) on the bond for any taxable year beginning after December 31, 1941:

"(1) *Interest wholly or partially taxable.* In the case of a bond (other than a bond the interest on which is excludible from gross

bond . . .," that the deduction for amortizable bond premium may not be taken if the interest is tax-exempt, but may be if the bond interest is taxable. Taxpayers holding bonds in the latter category may elect whether

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income), the amount of the amortizable bond premium for the taxable year shall be allowed as a deduction.

"(2) *Interest wholly tax-exempt.* In the case of any bond the interest on which is excludible from gross income, no deduction shall be allowed for the amortizable bond premium for the taxable year.

"(3) *Adjustment of credit in case of interest partially tax-exempt.* In the case of any bond the interest on which is allowable as a credit against net income, the credit provided in section 25 (a) (1) or (2), or section 26 (a), as the case may be, shall be reduced by the amount of the amortizable bond premium for the taxable year.

"(For adjustment to basis on account of amortizable bond premium, see section 113 (b) (1) (H)). [See note 6, *post*, p. 625.]

"(b) *Amortizable bond premium—*

"(1) *Amount of bond premium.* For the purposes of paragraph (2), the amount of bond premium, in the case of the holder of any bond, shall be determined with reference to the amount of the basis (for determining loss on sale or exchange) of such bond, and with reference to the amount payable on maturity or on earlier call date, with adjustments proper to reflect unamortized bond premium with respect to the bond, for the period prior to the date as of which subsection (a) becomes applicable with respect to the taxpayer with respect to such bond.

"(2) *Amount amortizable.* The amortizable bond premium of the taxable year shall be the amount of the bond premium attributable to such year.

"(3) *Method of determination.* The determinations required under paragraphs (1) and (2) shall be made—

"(A) in accordance with the method of amortizing bond premium regularly employed by the holder of the bond, if such method is reasonable;

"(B) in all other cases, in accordance with regulations prescribing reasonable methods of amortizing bond premium, prescribed by the Commissioner with the approval of the Secretary.

"(c) *Election on taxable and partially taxable bonds—*

"(1) *Eligibility to elect and bonds with respect to which election permitted.* This section shall apply with respect to the following

or not to amortize in accordance with rules laid down in subsection (c). Subsection (b) defines the method of computing "the amount of bond premium, in the case of the holder of any bond . . . ." Petitioner urges that this does not define the kind of bond premium which is amortizable; respondent contends that this provision establishes a mandatory computation applicable to any bond premium. Subsection (d) consists of a general definition of "bond" and certain exceptions thereto, chiefly bonds held for sale or as stock in trade. That the securities purchased by respondent fall within the general definition and without the exceptions is undisputed.

There can be no doubt that the callability and convertibility of these bonds do not remove them from the reach of § 125. The role of such bonds was specifically brought into the congressional discussion by at least one witness at the hearings.[4] And the Congress rendered unmistakably clear answers in the language of the Act, *e. g.*, by express reference to "earlier call date," § 125 (b) (1), and in both Committee Reports. "The fact that a bond is callable or convertible into stock does not of itself

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classes of taxpayers with respect to the following classes of bonds only if the taxpayer has elected to have this section apply.

. . . . . .

"(d) *Definition of bond.* As used in this section, the term 'bond' means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation and bearing interest (including any like obligation issued by a government or political subdivision thereof), with interest coupons or in registered form, but does not include any such obligation which constitutes stock in trade of the taxpayer or any such obligation of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or any such obligation held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

[4] See statement of Roy C. Osgood, 2 Hearings before Senate Committee on Finance on H. R. 7378, 77th Cong., 2d Sess. 1728–29 (1942).

prevent the application of this section. In the case of a callable bond, the earliest call date will, for the purposes of this section, be considered as the maturity date. Hence, the total premium is required to be spread over the period from the date as of which the basis of the bond is established down to the earliest call date, rather than down to the maturity date. In the case of a convertible bond, if the option to convert the bond into stock rests with the owner of the bond [as it did in this case], the bond is within the purview of this section." [5] The express decision of Congress to include the type of bonds purchased by respondent is of course binding on the courts.

Petitioner concedes that the bonds purchased by respondent are within the reach of § 125, but he urges that this case does not involve the kind of premium which Congress had in mind. The argument is that this premium was paid for the conversion privilege, whereas Congress intended to include only that premium (entitled "true" premium by petitioner) which is paid for securing a higher rate of interest than the market average and for nothing else. We reject this argument as inapposite to the structure of the statute, unsupported by the legislative history and inconsistent with the normal use of the term "bond premium."

As Congress wrote the statute, the scope of "bond premium" is adequately denoted by defining "bond." There was no need for Congress to qualify both words in order to make its meaning clear; "premium" as an isolated term may not be defined in the statute nor explained in the legislative history, but "premium" is never used in the statute apart from its mate "bond." No attempt to define and distinguish the reasons for paying premium

[5] H. R. Rep. No. 2333, 77th Cong., 2d Sess. 80 (1942). Precisely the same language appears in S. Rep. No. 1631, 77th Cong., 2d Sess. 94 (1942). U. S. Treas. Reg. 111, § 29.125–5, is of identical tenor.

mark the pertinent Treasury Regulations 111, § 29.125. They mirror the structure of the statute and are constructed in terms of "bonds." Again, we note that the bonds here involved are without question embraced by the statute.

To be sure, Congress might have proceeded by defining "premium" (and "true" premium) rather than, or as well as "bond." But we cannot reject the clear and precise avenue of expression actually adopted by the Congress because in a particular case we may know, if the bonds are disposed of prior to our decision, that the public revenues would be maximized by adopting another statutory path. Congress was legislating for the generality of cases. It not only created a new deduction but also required that the basis be adjusted to the extent of the deduction allowable for taxables and disallowable for tax-exempts.[6] The adjustment increased the revenue potential, for the lower basis obviously raised possible capital gain and lowered allowable capital loss. In the case of tax-exempt bonds, which had a total par value in 1942 of over 58.5 billion dollars,[7] there was no allowable deduction to be set off against this new revenue potential. In the case of taxable bonds, whether the tax paid on capital gains will exceed the tax avoided by the deduction depends in each particular instance upon the uncertainties of market fluctuations and tax rates and the cluster of

[6] Int. Rev. Code § 113 (b) (1) provides that "Proper adjustment in respect of the property shall in all cases be made . . . (H) in the case of any bond (as defined in section 125) the interest on which is wholly exempt from the tax imposed by this chapter, to the extent of the amortizable bond premium disallowable as a deduction pursuant to section 125 (a) (2), and in the case of any other bond (as defined in such section) to the extent of the deductions allowable pursuant to section 125 (a) (1) with respect thereto." See note 3, *ante*, p. 621, for the text of § 125.

[7] Of this amount, 25.5 billion was wholly, and 33.0 billion partially tax-exempt. Statistical Abstract of the United States 372 (1948).

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other factors which induces a bondholder to act and determines his tax in given years.[8] These factors may combine in a specific case to produce an effect upon revenue which to some may appear too drastic for Congress to have intended. But there is nothing in this record to indicate that Congress or the Treasury anticipated that the total long-run effect of §§ 113 and 125 on the yield from both taxables and tax-exempts would be to decrease federal revenue. And even if Congress had expected that some loss of revenue would be entailed, it might have decided that more equal treatment of taxpayers was more important than possible revenue loss; it cannot be argued that Congress lacked the legislative discretion to have reached such a conclusion. If in practice these sections are causing such loss of revenue as to indicate that Congress may have erred in its balancing of the competing considerations involved, the amendment must obviously be enacted by the Congress and not the Commissioner of Internal Revenue or this Court.

The legislative history fails to intimate that Congress intended to confine the deduction to bonds the premium on which was paid for a higher-than-market interest rate. At most, petitioner's presentation of the legislative materials suggests that Congress may have had the bondholder who was seeking a higher interest rate primarily in mind; but it does not establish that Congress in fact legislated with reference to him exclusively.[9] Congress,

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[8] In this case, the record does not disclose how petitioner disposed of the bonds. If for some reason he had sold them after six months at a price above 138, his capital gain would have exceeded the deduction he took on the bond premium. This possibility is not merely theoretical, for the bonds in fact stood above 138 for over a year, starting in August, 1945.

[9] Petitioner cites H. R. Rep. No. 2333, 77th Cong., 2d Sess. 47 (1942), and the statements of John O'Brien, 1 Hearings before Senate Committee on Finance on H. R. 7378, 77th Cong., 2d Sess. 52 (1942),

and the Treasury in advising Congress, may well have concluded that the best manner of affording him relief and correcting the inequitable treatment of bondholders whose interest receipts were taxable, was to define the scope of the amendment by reference to types of bonds rather than causes of premium payment.

As "bond premium" is used by accountants and other writers in the securities field, it is any payment in addition to face value.[10] There is no suggestion that the words have only a limited significance, echoing petitioner's "true" premium, applicable solely to that extra price caused by the desire to obtain a higher than average interest yield. On the contrary, some authors have noted the variety of causes which induce the payment of bond premium, and the practical impossibility of disentangling and isolating them for the purpose of relative evaluation, as would be required if petitioner's reading of the statute were upheld.[11] We adopt the view that "bond premium" in § 125 means any extra payment, regardless of the reason therefor, in accordance with the firmly established

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and Randolph Paul, 1 Hearings before House Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess. 90 (1942). None of these can be taken as a clear statement excluding premium reflecting financial inducements other than the interest rate.

[10] *E. g.*, "When bonds sell at a price greater than par, they are said to sell at a premium . . . ." Financial Handbook 1210 (3d ed. 1948); ". . . bond premium—the amount by which issue price, or cost at later date, exceeds maturity value . . . ." Paton, Advanced Accounting 197 (1941); Grossman, Investment Principles and Practice 14 (1939); Noble, Accounting Principles 447 (4th ed. 1945). And see *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 555 (1932); *New York Life Ins. Co.* v. *Edwards,* 271 U. S. 109, 116 (1926); 4 Bogert, Trusts and Trustees, § 831 (1935); 2 Scott on Trusts § 239.2 (1939).

[11] See, *e. g.*, 1 Dewing, Financial Policy of Corporations 662 (4th ed. 1941); Saliers and Holmes, Basic Accounting Principles 509 (1937); 4 (pt. 1) Bogert, Trusts and Trustees 319 (1935); 2 Scott on Trusts 1337 (1939); Williams, Are Convertibles Now Attractive? 83 Mag. of Wall St. 134 (1948).

principle of tax law that the ordinary meaning of terms is persuasive of their statutory meaning.[12]

We conclude that Congress made no distinctions based upon the inducements for paying the premium. Congress delimited the bond premium it wished to make amortizable in terms of categories of bonds, and there is no doubt that respondent purchased bonds which are included within the purview of § 125. Respondent is therefore entitled to this deduction and the judgment below is

Affirmed.

Mr. Justice Black dissents. He believes that this case should be decided in accordance with, and for the reasons given by, the opinion of the Court of Appeals for the Ninth Circuit in *Commissioner* v. *Shoong,* 177 F. 2d 131 (1949).

Mr. Justice Douglas and Mr. Justice Jackson took no part in the consideration or decision of this case.

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[12] *Crane* v. *Commissioner,* 331 U. S. 1, 6–7 (1947); *Helvering* v. *Flaccus Oak Leather Co.,* 313 U. S. 247, 249 (1941); *Helvering* v. *San Joaquin Fruit & Investment Co.,* 297 U. S. 496, 499 (1936); *Lang* v. *Commissioner,* 289 U. S. 109, 111 (1933); cf. *Atlantic Coast Line R. Co.* v. *Phillips,* 332 U. S. 168, 171 (1947).

SWEATT *v.* PAINTER ET AL.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 44. Argued April 4, 1950.—Decided June 5, 1950.

Petitioner was denied admission to the state-supported University of Texas Law School, solely because he is a Negro and state law forbids the admission of Negroes to that Law School. He was offered, but he refused, enrollment in a separate law school newly established by the State for Negroes. The University of Texas Law School has 16 full-time and three part-time professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an Order of the Coif affiliation, many distinguished alumni, and much tradition and prestige. The separate law school for Negroes has five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association and one alumnus admitted to the Texas Bar; but it excludes from its student body members of racial groups which number 85% of the population of the State and which include most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner would deal as a member of the Texas Bar. *Held:* The legal education offered petitioner is not substantially equal to that which he would receive if admitted to the University of Texas Law School; and the Equal Protection Clause of the Fourteenth Amendment requires that he be admitted to the University of Texas Law School. Pp. 631–636.

Reversed.

A Texas trial court found that a newly-established state law school for Negroes offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas" and denied mandamus to compel his admission to the University of Texas Law School. The Court of Civil Appeals affirmed. 210 S. W. 2d 442. The Texas Supreme Court denied writ of error. This Court granted certiorari. 338 U. S. 865. *Reversed,* p. 636.

W. J. Durham and *Thurgood Marshall* argued the cause for petitioner. With them on the brief were *Robert L. Carter, William R. Ming, Jr., James M. Nabrit* and *Franklin H. Williams.*

Price Daniel, Attorney General of Texas, and *Joe R. Greenhill,* First Assistant Attorney General, argued the cause for respondents. With them on the brief was *E. Jacobson,* Assistant Attorney General.

Briefs of *amici curiae,* supporting petitioner, were filed by *Solicitor General Perlman* and *Philip Elman* for the United States; *Paul G. Annes* for the American Federation of Teachers; *Thomas I. Emerson, Erwin N. Griswold, Robert Hale, Harold Havighurst* and *Edward Levi* for the Committee of Law Teachers Against Segregation in Legal Education; *Phineas Indritz* for the American Veterans Committee, Inc.; and *Marcus Cohn* and *Jacob Grumet* for the American Jewish Committee et al.

An *amici curiae* brief in support of respondents was filed on behalf of the States of Arkansas, by *Ike Murray,* Attorney General; Florida, by *Richard W. Ervin,* Attorney General, and *Frank J. Heintz,* Assistant Attorney General; Georgia, by *Eugene Cook,* Attorney General, and *M. H. Blackshear, Jr.,* Assistant Attorney General; Kentucky, by *A. E. Funk,* Attorney General, and *M. B. Holifield,* Assistant Attorney General; Louisiana, by *Bolivar E. Kemp, Jr.,* Attorney General; Mississippi, by *Greek L. Rice,* Attorney General, and *George H. Ethridge,* Acting Attorney General; North Carolina, by *Harry McMullan,* Attorney General, and *Ralph Moody,* Assistant Attorney General; Oklahoma, by *Mac Q. Williamson,* Attorney General; South Carolina, by *John M. Daniel,* Attorney General; Tennessee, by *Roy H. Beeler,* Attorney General, and *William F. Barry,* Solicitor General; and Virginia, by *J. Lindsay Almond, Jr.,* Attorney General, and *Walter E. Rogers,* Assistant Attorney General.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

This case and *McLaurin* v. *Oklahoma State Regents, post,* p. 637, present different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court. We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible. *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947), and cases cited therein. Because of this traditional reluctance to extend constitutional interpretations to situations or facts which are not before the Court, much of the excellent research and detailed argument presented in these cases is unnecessary to their disposition.

In the instant case, petitioner filed an application for admission to the University of Texas Law School for the February, 1946 term. His application was rejected solely because he is a Negro.[1] Petitioner thereupon brought this suit for mandamus against the appropriate school officials, respondents here, to compel his admission. At that time, there was no law school in Texas which admitted Negroes.

The state trial court recognized that the action of the State in denying petitioner the opportunity to gain

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[1] It appears that the University has been restricted to white students, in accordance with the State law. See Tex. Const., Art. VII, §§ 7, 14; Tex. Rev. Civ. Stat. (Vernon, 1925), Arts. 2643b (Supp. 1949), 2719, 2900.

a legal education while granting it to others deprived him of the equal protection of the laws guaranteed by the Fourteenth Amendment. The court did not grant the relief requested, however, but continued the case for six months to allow the State to supply substantially equal facilities. At the expiration of the six months, in December, 1946, the court denied the writ on the showing that the authorized university officials had adopted an order calling for the opening of a law school for Negroes the following February. While petitioner's appeal was pending, such a school was made available, but petitioner refused to register therein. The Texas Court of Civil Appeals set aside the trial court's judgment and ordered the cause "remanded generally to the trial court for further proceedings without prejudice to the rights of any party to this suit."

On remand, a hearing was held on the issue of the equality of the educational facilities at the newly established school as compared with the University of Texas Law School. Finding that the new school offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas," the trial court denied mandamus. The Court of Civil Appeals affirmed. 210 S. W. 2d 442 (1948). Petitioner's application for a writ of error was denied by the Texas Supreme Court. We granted certiorari, 338 U. S. 865 (1949), because of the manifest importance of the constitutional issues involved.

The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities,

scholarship funds, and Order of the Coif affiliation. The school's alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State. It may properly be considered one of the nation's ranking law schools.

The law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived; [2] nor was there any full-time librarian. The school lacked accreditation.

Since the trial of this case, respondents report the opening of a law school at the Texas State University for Negroes. It is apparently on the road to full accreditation. It has a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who has become a member of the Texas Bar.

Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law

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[2] "Students of the interim School of Law of the Texas State University for Negroes [located in Austin, whereas the permanent School was to be located at Houston] shall have use of the State Law Library in the Capitol Building. . . ." Tex. Laws 1947, c. 29, § 11, Tex. Rev. Civ. Stat. (Vernon, 1949 Supp.), note to Art. 2643b. It is not clear that this privilege was anything more than was extended to all citizens of the State.

review and similar activities, the University of Texas Law School is superior. [What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.] It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and

prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner. That such a claim, if made, would be dishonored by the State, is no answer. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer,* 334 U. S. 1, 22 (1948).

It is fundamental that these cases concern rights which are personal and present. This Court has stated unanimously that "The State must provide [legal education] for [petitioner] in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633 (1948). That case "did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes." *Fisher* v. *Hurst,* 333 U. S. 147, 150 (1948). In *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 351 (1938), the Court, speaking through Chief Justice Hughes, declared that "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity." These are the only cases in this Court which present the issue of the constitutional validity of race distinctions in state-supported graduate and professional education.

In accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State. We cannot, therefore,

agree with respondents that the doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), requires affirmance of the judgment below. Nor need we reach petitioner's contention that *Plessy* v. *Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation. See *supra,* p. 631.

We hold that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School. The judgment is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed.

McLAURIN v. OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 34. Argued April 3–4, 1950.—Decided June 5, 1950.

Appellant, a Negro citizen of Oklahoma possessing a master's degree, was admitted to the Graduate School of the state-supported University of Oklahoma as a candidate for a doctorate in education and was permitted to use the same classroom, library and cafeteria as white students. Pursuant to a requirement of state law that the instruction of Negroes in institutions of higher education be "upon a segregated basis," however, he was assigned to a seat in the classroom in a row specified for Negro students, was assigned to a special table in the library, and, although permitted to eat in the cafeteria at the same time as other students, was assigned to a special table there. *Held:* The conditions under which appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws; and the Fourteenth Amendment precludes such differences in treatment by the State based upon race. Pp. 638–642.

(a) The restrictions imposed upon appellant impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession. Pp. 640–641.

(b) That appellant may still be set apart by his fellow students and may be in no better position when these restrictions are removed is irrelevant, for there is a constitutional difference between restrictions imposed by the State which prohibit the intellectual commingling of students and the refusal of students to commingle where the State presents no such bar. P. 641.

(c) Having been admitted to a state-supported graduate school, appellant must receive the same treatment at the hands of the State as students of other races. P. 642.

87 F. Supp. 528, reversed.

The proceedings below are stated in the opinion. The judgment below is *reversed*, p. 642.

Robert L. Carter and *Amos T. Hall* argued the cause for appellant. With them on the brief were *Thurgood*

Marshall and *Frank D. Reeves.* *Marian W. Perry* and *Franklin H. Williams* were also of counsel.

Fred Hansen, First Assistant Attorney General of Oklahoma, argued the cause for appellees. With him on the brief was *Mac Q. Williamson,* Attorney General.

Briefs of *amici curiae,* supporting appellant, were filed by *Solicitor General Perlman* and *Philip Elman* for the United States; *Paul G. Annes* for the American Federation of Teachers; *Phineas Indritz* for the American Veterans Committee, Inc.; *Arthur J. Goldberg* for the Congress of Industrial Organizations; *Edward J. Ennis* and *Saburo Kido* for the Japanese American Citizens League; and *Arthur Garfield Hays* and *Eugene Nickerson* for the American Civil Liberties Union.

Mr. Chief Justice Vinson delivered the opinion of the Court.

In this case, we are faced with the question whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race. We decide only this issue; see *Sweatt* v. *Painter, ante,* p. 629.

Appellant is a Negro citizen of Oklahoma. Possessing a Master's Degree, he applied for admission to the University of Oklahoma in order to pursue studies and courses leading to a Doctorate in Education. At that time, his application was denied, solely because of his race. The school authorities were required to exclude him by the Oklahoma statutes, 70 Okla. Stat. (1941) §§ 455, 456, 457, which made it a misdemeanor to maintain or operate, teach or attend a school at which both whites and Negroes are enrolled or taught. Appellant filed a complaint requesting injunctive relief, alleging that the action of the school authorities and the statutes upon which their action was based were unconstitutional and deprived him

of the equal protection of the laws. Citing our decisions in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938), and *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948), a statutory three-judge District Court held that the State had a Constitutional duty to provide him with the education he sought as soon as it provided that education for applicants of any other group. It further held that to the extent the Oklahoma statutes denied him admission they were unconstitutional and void. On the assumption, however, that the State would follow the constitutional mandate, the court refused to grant the injunction, retaining jurisdiction of the cause with full power to issue any necessary and proper orders to secure McLaurin the equal protection of the laws. 87 F. Supp. 526.

Following this decision, the Oklahoma legislature amended these statutes to permit the admission of Negroes to institutions of higher learning attended by white students, in cases where such institutions offered courses not available in the Negro schools. The amendment provided, however, that in such cases the program of instruction "shall be given at such colleges or institutions of higher education upon a segregated basis." [1] Appel-

[1] The amendment adds the following proviso to each of the sections relating to mixed schools: "Provided, that the provisions of this Section shall not apply to programs of instruction leading to a particular degree given at State owned or operated colleges or institutions of higher education of this State established for and/or used by the white race, where such programs of instruction leading to a particular degree are not given at colleges or institutions of higher education of this State established for and/or used by the colored race; provided further, that said programs of instruction leading to a particular degree shall be given at such colleges or institutions of higher education upon a segregated basis." 70 Okla. Stat. Ann. (1950) §§ 455, 456, 457. Segregated basis is defined as "classroom instruction given in separate classrooms, or at separate times." *Id.* § 455.

lant was thereupon admitted to the University of Oklahoma Graduate School. In apparent conformity with the amendment, his admission was made subject to "such rules and regulations as to segregation as the President of the University shall consider to afford to Mr. G. W. McLaurin substantially equal educational opportunities as are afforded to other persons seeking the same education in the Graduate College," a condition which does not appear to have been withdrawn. Thus he was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.

To remove these conditions, appellant filed a motion to modify the order and judgment of the District Court. That court held that such treatment did not violate the provisions of the Fourteenth Amendment and denied the motion. 87 F. Supp. 528. This appeal followed.

In the interval between the decision of the court below and the hearing in this Court, the treatment afforded appellant was altered. For some time, the section of the classroom in which appellant sat was surrounded by a rail on which there was a sign stating, "Reserved For Colored," but these have been removed. He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.

It is said that the separations imposed by the State in this case are in form merely nominal. McLaurin uses the same classroom, library and cafeteria as students of other races; there is no indication that the seats to which he is assigned in these rooms have any disadvantage

of location. He may wait in line in the cafeteria and there stand and talk with his fellow students, but while he eats he must remain apart.

These restrictions were obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.

Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.

It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. *Shelley* v. *Kraemer,* 334 U. S. 1, 13–14 (1948). The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity

to secure acceptance by his fellow students on his own merits.

We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. See *Sweatt* v. *Painter, ante,* p. 629. We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races. The judgment is

Reversed.

TRAVELERS HEALTH ASSOCIATION ET AL. *v.* VIRGINIA EX REL. STATE CORPORATION COMMISSION.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 76. Argued November 15, 1949.—Reargued April 17, 1950.—Decided June 5, 1950.

In a proceeding under § 6 of the Virginia "Blue Sky Law," the State Corporation Commission ordered an Association, located in Nebraska and engaged in the mail-order health insurance business, and its treasurer (appellants here) to cease and desist from further offerings or sales of certificates of insurance to Virginia residents until the Association had complied with the Act by furnishing information as to its financial condition, consenting to suit against it by service of process on the Secretary of the Commonwealth, and obtaining a permit. Notice of the proceeding was served on appellants by registered mail, as authorized by § 6 when other forms of service are unavailable. They appeared specially, challenged the jurisdiction of the State, and moved to quash the service of summons. On recommendations from Virginia members, the Association for many years had been issuing insurance certificates to residents of Virginia, and it had approximately 800 members there. It had caused claims for losses to be investigated, and the Virginia courts were open to it for the enforcement of obligations of certificate holders. *Held:*

1. The State has power to issue a cease and desist order to enforce at least the requirement that the Association consent to suit against it by service of process on the Secretary of the Commonwealth. Pp. 646–647.

2. The contacts and ties of appellants with Virginia residents, together with that State's interest in faithful observance of the certificate obligations, justify subjecting appellants to cease and desist proceedings under § 6. Pp. 647–648.

3. Virginia's subjection of the Association to the jurisdiction of the State Commission in a § 6 proceeding is consistent with fair play and substantial justice, and is not offensive to the Due Process Clause of the Fourteenth Amendment. P. 649.

4. The power of the State to subject the Association to the jurisdiction of the State Commission and to authorize a cease and

desist order under § 6 is not vitiated by the fact that business activities carried on outside of the State are affected. P. 650.

5. Service of process on appellants by registered mail did not violate the requirements of due process. Pp. 650–651.

188 Va. 877, 51 S. E. 2d 263, affirmed.

An order of the Virginia Corporation Commission requiring appellants to cease and desist from offering and issuing, without a permit, certificates of insurance to residents of the State, was affirmed by the Supreme Court of Appeals. 188 Va. 877, 51 S. E. 2d 263. On appeal to this Court, *affirmed*, p. 651.

Moses G. Hubbard, Jr. argued the cause for appellants. With him on the brief was *Thomas B. Gay.*

Walter E. Rogers, Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief was *J. Lindsay Almond, Jr.,* Attorney General.

A brief supporting appellee was filed as *amici curiae* by *Nathaniel L. Goldstein,* Attorney General, *Wendell P. Brown,* Solicitor General, and *John C. Crary, Jr.,* Assistant Attorney General, for the State of New York; *William L. Phinney,* Attorney General, for the State of New Hampshire; and *Hall Hammond,* Attorney General, for the State of Maryland.

Mr. Justice Black delivered the opinion of the Court.

In an effort to protect its citizens from "unfairness, imposition or fraud" in sales of certificates of insurance and other forms of securities, the Virginia "Blue Sky Law" requires those selling or offering such securities to obtain a permit from the State Corporation Commission.[1] Applicants for permits must meet comprehensive conditions: they must, for example, provide detailed infor-

[1] Acts of the General Assembly of Virginia, 1928, c. 529, p. 1373, as amended, Acts of 1932, c. 236, p. 434; Michie's 1942 Code of Virginia, § 3848 (47) *et seq.*

mation concerning their solvency, and must agree that suits can be filed against them in Virginia by service of process on the Secretary of the Commonwealth.[2]

While violation of the Act is a misdemeanor punishable by criminal sanctions, § 6 provides another method for enforcement. After notice and a hearing "on the merits," the State Corporation Commission is authorized to issue a cease and desist order restraining violations of the Act. The section also provides for service by registered mail where other types of service are unavailable "because the offering is by advertisement and/or solicitation through periodicals, mail, telephone, telegraph, radio, or other means of communication from beyond the limits of the State . . . ." The highest court of Virginia rejected contentions that this section violates constitutional requirements of due process, and the case is properly here on appeal under 28 U. S. C. § 1257 (2).

In this case cease and desist proceedings under § 6 were instituted by the State Corporation Commission against Travelers Health Association and against R. E. Pratt, as treasurer of the Association and in his personal capacity. Having received notice by registered mail only, they appeared "specially" for "the sole purpose of objecting to the alleged jurisdiction of the Commonwealth of Virginia and of its State Corporation Commission, and of moving to set aside and quash service of summons . . . ." The agreed stipulation of facts and certain exhibits offered by the state can be summarized as follows:

The appellant Travelers Health Association was incorporated in Nebraska as a nonprofit membership association in 1904. Since that time its only office has been located in Omaha, from which it has conducted a mail-order health insurance business. New members pay an initiation fee and obligate themselves to pay periodic

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[2] Michie § 3848 (51), (55).

assessments at the Omaha office. The funds so collected are used for operating expenses and sick benefits to members. The Association has no paid agents; its new members are usually obtained through the unpaid activities of those already members, who are encouraged to recommend the Association to friends and submit their names to the home office. The appellant Pratt in Omaha mails solicitations to these prospects. He encloses blank applications which, if signed and returned to the home office with the required fee, usually result in election of applicants as members. Certificates are then mailed, subject to return within 10 days "if not satisfactory." Travelers has solicited Virginia members in this manner since 1904, and has caused many sick benefit claims to be investigated. When these proceedings were instituted, it had approximately 800 Virginia members.

The Commission, holding that the foregoing facts supported the state's power to act in § 6 proceedings, overruled appellants' objection to jurisdiction and their motion to quash service. The Association and its treasurer were ordered to cease and desist from further solicitations or sales of certificates to Virginia residents "through medium of any advertisement from within or from without the State, and/or through the mails or otherwise, by intra- or inter-state communication, . . . unless and until" it obtained authority in accordance with the "Blue Sky Law." This order was affirmed by the Virginia Court of Appeals. 188 Va. 877, 882, 51 S. E. 2d 263, 271.

Appellants do not question the validity of the Virginia law "to the extent that it provides that individual and corporate residents of other states shall not come into the State for the purpose of doing business there without first submitting to the regulatory authority of the State." As to such state power see, *e. g., Hall* v. *Geiger-Jones Co.*, 242 U. S. 539. Their basic contention is that all their activities take place in Nebraska, and that consequently

Virginia has no power to reach them in cease and desist proceedings to enforce any part of its regulatory law. We cannot agree with this general due process objection, for we think the state has power to issue a "cease and desist order" enforcing at least that regulatory provision requiring the Association to accept service of process by Virginia claimants on the Secretary of the Commonwealth.

Appellants' chief reliance for the due process contention is on *Minnesota Assn.* v. *Benn,* 261 U. S. 140. There a Minnesota association obtained members in Montana by the same mail solicitation process used by Travelers to get Virginia members. The certificates issued to Montana members also reserved the right to investigate claims, although the Court pointed out that Benn's claim had not been investigated. This Court held that since the contracts were "executed and to be performed" in Minnesota, the Association was not "doing business" in Montana and therefore could not be sued in Montana courts unless "consent" to Montana suits could be implied. The Court found the circumstances under which the insurance transactions took place insufficient to support such an implication.

But where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional "consent" in order to sustain the jurisdiction of regulatory agencies in the latter state. And in considering what constitutes "doing business" sufficiently to justify regulation in the state where the effects of the "business" are felt, the narrow grounds relied on by the Court in the *Benn* case cannot be deemed controlling.

In *Osborn* v. *Ozlin,* 310 U. S. 53, 62, we recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the "state action may have repercussions beyond state lines . . . ." And in *Hoope-*

ston Canning Co. v. *Cullen,* 318 U. S. 313, 316, we rejected the contention, based on the *Benn* case among others, that a state's power to regulate must be determined by a "conceptualistic discussion of theories of the place of contracting or of performance." Instead we accorded "great weight" to the "consequences" of the contractual obligations in the state where the insured resided and the "degree of interest" that state had in seeing that those obligations were faithfully carried out. And in *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316, this Court, after reviewing past cases, concluded: "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Measured by the principles of the *Osborn, Hoopeston* and *International Shoe* cases, the contacts and ties of appellants with Virginia residents, together with that state's interest in faithful observance of the certificate obligations, justify subjecting appellants to cease and desist proceedings under § 6. The Association did not engage in mere isolated or short-lived transactions. Its insurance certificates, systematically and widely delivered in Virginia following solicitation based on recommendations of Virginians, create continuing obligations between the Association and each of the many certificate holders in the state. Appellants have caused claims for losses to be investigated and the Virginia courts were available to them in seeking to enforce obligations created by the group of certificates. See *International Shoe Co.* v. *Washington, supra,* at 320.

Moreover, if Virginia is without power to require this Association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificate holders might be Nebraska. Health benefit

claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit. In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses would presumably be investigated. Such factors have been given great weight in applying the doctrine of *forum non conveniens.* See *Gulf Oil Co.* v. *Gilbert,* 330 U. S. 501, 508. And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated.[3] The Due Process Clause does not forbid a state to protect its citizens from such injustice.

There is, of course, one method by which claimants could recover from appellants in Virginia courts without the aid of substituted service of process: certificate holders in Virginia could all be garnished to the extent of their obligations to the Association. See *Huron Corp.* v. *Lincoln Co.,* 312 U. S. 183, 193. While such an indirect procedure would undeniably be more troublesome to claimants than the plan adopted by the state in its "Blue Sky Law," it would clearly be even more harassing to the Association and its Virginia members. Metaphysical concepts of "implied consent" and "presence" in a state should not be solidified into a constitutional barrier against Virginia's simple, direct and fair plan for service of process on the Secretary of the Commonwealth.

We hold that Virginia's subjection of this Association to the jurisdiction of that State's Corporation Commission in a § 6 proceeding is consistent with "fair play and substantial justice," and is not offensive to the Due Process Clause.

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[3] *Lumbermen's Ins. Co.* v. *Meyer,* 197 U. S. 407, 418, 419; *Mutual Life Ins. Co.* v. *Spratley,* 172 U. S. 602, 619; *cf. International Shoe Co.* v. *Washington,* 326 U. S. 310, 319.

Appellants also contend that § 6 as here applied violates due process because the Commission order attempts to "destroy or impair" their right to make contracts in Nebraska with Virginia residents. Insofar as this contention can be raised in a special appearance merely to contest jurisdiction, it is essentially the same as the due process issue discussed above. For reasons just given, Virginia has power to subject Travelers to the jurisdiction of its Corporation Commission, and its cease and desist provisions designed to accomplish this purpose "can not be attacked merely because they affect business activities which are carried on outside the state." *Hoopeston Canning Co.* v. *Cullen, supra,* 320–321. See also *Osborn* v. *Ozlin,* 310 U. S. 53, 62. These two opinions make clear that *Allgeyer* v. *Louisiana,* 165 U. S. 578, requires no different result.

Appellants concede that in the *Osborn* and *Hoopeston* cases we sustained state laws providing protective standards for policyholders in those states, even though compliance with those standards by the insurance companies could have repercussions on similar out-of-state contracts. It is argued, however, that those cases are distinguishable because they both involved companies which were "licensed to do business in the state of the forum and were actually doing business within the state . . . ." But while Hoopeston Canning Co. had done business in New York under an old law, it brought the case here to challenge certain provisions of a new licensing law with which it had to comply if it was to do business there in the future. Thus it was seeking the same kind of relief that appellants seek here, and for the same general purpose. What we there said as to New York's power is equally applicable to Virginia's power here.

It is also suggested that service of process on appellants by registered mail does not meet due process require-

ments. What we have said answers this contention insofar as it alleges a lack of state jurisdiction because appellants were served outside Virginia. If service by mail is challenged as not providing adequate and reasonable notice, the contention has been answered by *International Shoe Co.* v. *Washington, supra,* 320–321. See also *Mullane* v. *Central Hanover Bank,* 339 U. S. 306.

The due process questions we have already discussed are the only alleged errors relied on in appellants' brief,[4] and appellants' special appearance only challenged state jurisdiction and the service of process. We therefore have no occasion to discuss the scope of the Commission's order, or the methods by which the state might attempt to enforce it.[5]

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

Since the formula adopted by the Court is adequate to dispose of this case, I have joined in the opinion. But I feel that the type of problem presented requires a more selective treatment. Hence my separate opinion.

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[4] One federal question suggested in the appellants' statement of jurisdiction was that § 6 as interpreted by the state court infringed federal control of the mails delegated to Congress by Art. I, § 8, cl. 7 of the United States Constitution. But appellants' brief on submission of the case does not include this question in the "specifications of errors relied upon" and does not even mention that constitutional clause.

[5] For examples of problems which might be raised by attempts to impose punishment for violation of the order, see *Strassheim* v. *Daily,* 221 U. S. 280, 284–285; *cf. Hyatt* v. *Corkran,* 188 U. S. 691, 712, 719. Section 6 itself provides no method for enforcement, except insofar as such stature might be attributed to its provision for giving a cease and desist order "publicity . . . to the public through the press or otherwise as the commission may, in its discretion, determine to be advisable for the reasonable information and protection of the public."

Virginia's Blue Sky Law[1] is a comprehensive scheme for the protection of the state's investors. Securities can be offered for sale in the state only after the issuer obtains a permit.[2] To get it, the applicant must supply detailed information about its solvency, its earning record, and the nature of the securities.[3] Promoters may be required to supply a bond.[4] Applicants must appoint an agent, the Secretary of the Commonwealth, to receive service of process.[5] Only after proof of their good character and financial responsibility are security salesmen licensed.[6] After issuance, the state Corporation Commission is authorized again to investigate the issuer with an eye to possible revocation of its permit.[7] These are the high points of the comprehensive regulation which Virginia seeks to apply to appellants.

That the business of insurance is interstate commerce is established by *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. Any doubts about the power of a state to exclude an interstate insurance company which refuses to comply with its regulatory laws were dispelled by the passage of the McCarran Act. 59 Stat. 33, 15 U. S. C. §§ 1011–1015. See *Robertson* v. *California*, 328 U. S. 440, 461, 462.

The requirements of due process do not, in my opinion, preclude the extension of Virginia's regulatory scheme to appellant. I put to one side the case where a policyholder seeks to sue the out-of-state company in Virginia.

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[1] Acts of the General Assembly of Virginia, 1928, c. 529, p. 1373, as amended, Acts of 1932, c. 236, p. 434; Michie's 1942 Code of Virginia, § 3848 (47) *et seq.*

[2] Michie § 3848 (47).

[3] Michie § 3848 (51).

[4] Michie § 3848 (51) (r).

[5] Michie § 3848 (55).

[6] Michie § 3848 (50) (m).

[7] Michie § 3848 (53).

His ability to sue is not necessarily the measure of Virginia's power to regulate, as the Court said in *Old Wayne Life Assn.* v. *McDonough,* 204 U. S. 8, 21. It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process. What is necessary to sustain a tax or to maintain a suit by a creditor (see *Old Wayne Life Assn.* v. *McDonough, supra; Provident Savings Assn.* v. *Kentucky,* 239 U. S. 103, 114–116; Isaacs, An Analysis of Doing Business, 25 Col. L. Rev. 1018, 1024) is not in my view determinative when the state seeks to regulate solicitation within its borders.

Blue Sky Laws are a well-recognized exercise of the police power of the states. See *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 552. The wiles of the salesman have been many; the devices to avoid state regulation have been clever and calculated. One of those who contested the constitutionality of the Michigan Blue Sky Law in *Merrick* v. *Halsey & Co.,* 242 U. S. 568, 573, had no place of business in the state and was not sending agents into it. The history of the various methods used to evade state regulation is too recent to require extended comment. Instrumentalities of interstate and foreign commerce were extensively employed by those beyond the reach of a state to sell securities to its citizens. See H. R. Rep. No. 85, 73d Cong., 1st Sess. 10. The Securities Act of 1933 (48 Stat. 74, 15 U. S. C. § 77a *et seq.*) was passed to fill the gap.[8]

A state is helpless when the out-of-state company operates beyond the borders, establishes no office in the state, and has no agents, salesmen, or solicitors to obtain

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[8] By § 3 (a) (8) insurance policies issued by a corporation subject to the supervision of specified state agencies are exempt from this federal regulation. Section 18 provides that the Act does not affect the jurisdiction of any state agency over a security or a person.

business for it within the state. Then it is beyond the reach of process. In the present case, however, that is only the formal arrangement. The actual arrangement shows a method of soliciting business within Virginia as active, continuous, and methodical as it would be if regular agents or solicitors were employed. Cf. *Hoopeston Co.* v. *Cullen,* 318 U. S. 313.

Practically all of appellants' business in Virginia originates with and is the result of the activities of its Virginia members. The recommendation of a member relieves an applicant of the duty of furnishing any reference. Though the old members are not designated as "agents," it "clearly appears," as stated by the Supreme Court of Appeals, "that the association relies almost exclusively on these activities of its Virginia members to bring about an expansion of its Virginia business." *Travelers Health Assn.* v. *Virginia,* 188 Va. 877, 887; 51 S. E. 2d 263, 267. This device for soliciting business in Virginia may be unconventional and unorthodox; but it operates functionally precisely as though appellants had formally designated the Virginia members as their agents. Through these people appellants have realistically entered the state, looking for and obtaining business. Whether such solicitation is isolated or continuous, it is activity which Virginia can regulate. See *Hooper* v. *California,* 155 U. S. 648, 658. The requirements of due process may demand more or less[9] minimal contacts than are present here, depending on what the pinch of the decision is or what it requires of the foreign corporation. See *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316–319. Where

[9] As Mr. Justice Rutledge said in *Frene* v. *Louisville Cement Co.,* 77 U. S. App. D. C. 129, 134, 134 F. 2d 511, 516, ". . . some casual or even single acts done within the borders of the sovereignty may confer power to acquire jurisdiction of the person, provided there is also reasonable provision for giving notice of the suit in accordance with minimal due process requirements."

the corporate project entails the use of one or more people in the state for the solicitation of business, in my view it does no violence to the traditional concept of due process to allow the state to provide protective measures governing that solicitation. That is all that is done here.

I cannot agree that this appeal is premature. Virginia has placed an injunction on appellants, an injunction which may have numerous consequences, *e. g.*, contempt proceedings. There is an existing controversy—real and vital to appellants.

MR. JUSTICE MINTON, with whom MR. JUSTICE JACKSON joins, dissenting.

The State Corporation Commission of Virginia instituted the proceedings leading to the cease and desist order entered in the instant case under § 6 of the Virginia Securities Law. Michie's Va. Code, 1942, § 3848 (52). That section provides for service by registered mail upon persons or corporations offering securities through the mails or by other means of communication. After hearing, the Commission is authorized to issue the order and to give it such publicity as the Commission considers desirable.

In this case no action has been taken under § 15 of the Law which provides that violation of the statute is a misdemeanor and punishable by fine, or under § 17 which provides for the imposition of a fine upon failure to comply with a lawful order of the Commission. Michie's Va. Code, 1942, § 3848 (61) (63). The Commission has in no way attempted to enforce the order issued by the Commission against appellants. Therefore appellants have not been hurt, and the question of due process is not reached. In the scheme of the statute, publicity appears to be the sole sanction of § 6. I know of no reason why Virginia may not go through this

shadow-boxing performance in order to publicize the activities of appellants in Virginia and notify its citizens that appellants have not qualified under the Securities Law. That is all the Commission says that it is doing or has the power to do under § 6. The Commission's view of the nature of this proceeding—a view reiterated by Virginia in its brief on the appeal to this Court—was stated in its opinion:

> "Respondents rely on the fact that their contacts with citizens of Virginia are by mail, that they are not doing business in Virginia and that they do not enter Virginia either personally or by agents. In setting up this defense they lose sight of the nature of this action. They are not charged with doing business in Virginia but with offering and advertising for sale and promoting the sale of insurance contracts in Virginia by mail and the action is to foreclose them from these activities. Whether the action will suffice to actually stop them is beside the point. It will suffice to put them on notice of pertinent laws of Virginia, to give them an opportunity to be heard and the state an opportunity to determine the facts, and, if, after hearing, a cease and desist order is issued, the Commission will then be authorized to give such publicity to the order as it sees fit for the 'information and protection of the public.' "
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> . . . . .
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> "No word found in or inference derived from Section 6, aforesaid, may properly, in our judgment, be said to impose penalties upon the respondents. . . ."
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> . . . . .
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> "There is no element of compulsion except such as may flow from a dread of the publicity attending such an order. In such cases, the only weapon available to the Commonwealth is to publicly advise that the

> securities of the respondent do not bear the stamp of the state's approval and are being presented to the public without regard to the regulatory laws enacted to protect them. Section 6, *supra,* imposes no penalties, exacts no direct toll from those against whom its orders proceed. . . ."

The question of substituted service on the Secretary of the Commonwealth is not here in any aspect. As far as appears, service in this manner is not authorized by the Virginia statutes except where the nonresident has opened and is conducting a place of business within the State. Michie's Va. Code, 1942, § 3848 (55)a. Up to this date Virginia has not claimed the power to require appellants, who do business in Virginia only by mail, to appoint the Secretary of the Commonwealth as their agent for service of process, nor have the courts of Virginia rendered judgment in a suit where service was made in that manner. I do not understand, therefore, what possible application the Court's reference to substituted service on the Secretary of the Commonwealth could have in this case. I would answer the question of due process when Virginia has attempted to apply its process to appellants in a proceeding that has consequences of a nature which entitle a person to the protection of the Due Process Clause. See *Parker* v. *Los Angeles County,* 338 U. S. 327. I would, therefore, dismiss the appeal.

As stated, it seems to me that the majority opinion is saying that Virginia has more power than it claims in the instant proceeding. While Virginia has not attempted to do more than publicize the activities of appellants in the State, I read the majority opinion to intimate that under the service by registered letter Virginia might go further. The cease and desist order issued cannot validly compel appellants to designate the Secretary of the Commonwealth as their agent for service of process, any more than

it can constitutionally be considered as automatically accomplishing that result. An *in personam* judgment cannot be based upon service by registered letter on a nonresident corporation or a natural person, neither of whom has ever been within the State of Virginia. *Pennoyer* v. *Neff,* 95 U. S. 714; *Old Wayne Life Assn.* v. *McDonough,* 204 U. S. 8, 22–23. If that may not be done directly, it may not be done indirectly. Certainly such service cannot be justified where its purpose is to make substituted service legal in the future. These nonresidents cannot be brought in through service by registered mail and compelled to designate the Secretary of the Commonwealth as their agent for service of process so that thereafter service may be effected upon such nonresidents by serving the Secretary. So to hold would allow the State to pull itself up by its own bootstraps.

Service by registered mail is said by the majority to be sufficient where the corporation has "minimum contacts" with the state of the forum. How many "contacts" a corporation or person must have before being subjected to suit we are not informed. Here all of appellants' contacts with the residents of Virginia were by mail. No agent of appellant corporation has entered the State, nor has the individual appellant. The contracts were made wholly in Nebraska. Under these circumstances, I would hold that appellants were never "present" in Virginia.

> "For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316–317.

As I understand the *International Shoe Co.* case, the minimum contacts which a corporation has in the State

must be "activities of the corporation's agent within the state." There were such contacts by agents within the State in that case. Service was made, in addition to notice by registered letter, by personal service within the State upon one of those agents. Service on an agent within the jurisdiction would seem to me indispensable to a judgment against a corporation. It would seem to be an *a fortiori* proposition that judgment could not be obtained against a natural person who was not available for personal service.

We are not dealing here with the *power* of Virginia to regulate the transaction of insurance business with its citizens, as was the case in *Osborn* v. *Ozlin,* 310 U. S. 53, and *Hoopeston Co.* v. *Cullen,* 318 U. S. 313. In the case at bar we are concerned only with how Virginia may *enforce* such power as it has. No question of the sufficiency of service was involved in either the *Osborn* or the *Hoopeston* case, both of which were brought against some officer of a state. The question in those cases was whether the State had power, and not whether, having the power, it had also acquired jurisdiction of a defendant against whom a judgment could be rendered enforcing that power.

I would not attempt to instruct Virginia as to how to protect its citizens from these intruders from Nebraska. But I do not believe we should even intimate that judgments *in personam* may be obtained, by the simple process of sending a registered letter, against a corporation whose agents have never been in the forum where suit is brought, or against a natural person who is not personally served within the State.

MR. JUSTICE REED and MR. JUSTICE FRANKFURTER, agreeing with the Court in reaching the merits, on the merits join this dissent.

QUICKSALL *v.* MICHIGAN.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 33. Argued February 6, 1950.—Decided June 5, 1950.

Upon his plea of guilty of murder, petitioner was sentenced by a Michigan state court to imprisonment for life. The State had long before abolished capital punishment. Almost ten years later, petitioner moved to vacate the sentence and for a new trial, claiming that a federal constitutional right to assistance of counsel had been infringed and that his plea of guilty had been induced by misrepresentations by the prosecuting attorney and the sheriff. The motion was heard before the same judge who had received his plea of guilty and sentenced him. The motion was denied and the State Supreme Court affirmed. *Held:* Upon the record in this case, petitioner has failed to sustain the burden of proving such a disregard of fundamental fairness in the imposition of punishment by the State as would justify this Court in setting aside the sentence as violative of the Due Process Clause. Pp. 661–665.

(a) In the circumstances of this case, the failure of the record to show that petitioner was offered counsel does not offend the Due Process Clause. Pp. 665–666.

(b) When a crime subject to capital punishment is not involved, each case depends on its own facts. P. 666.

(c) To invalidate a plea of guilty, a state prisoner must establish that an ingredient of unfairness actively operated in the process that resulted in his confinement. P. 666.

322 Mich. 351, 33 N. W. 2d 904, affirmed.

Petitioner's motion to vacate a sentence of life imprisonment theretofore imposed upon him, and for a new trial, was denied by a Michigan state court. The State Supreme Court affirmed. 322 Mich. 351, 33 N. W. 2d 904. This Court granted certiorari. 336 U. S. 916. *Affirmed*, p. 666.

Isadore Levin argued the cause and filed a brief for petitioner.

Edmund E. Shepherd, Solicitor General of Michigan, argued the cause for respondent. With him on the brief were *Stephen J. Roth,* Attorney General, and *Daniel J. O'Hara,* Assistant Attorney General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner is in custody of the State of Michigan under a sentence of life imprisonment for first-degree murder, confirmed upon collateral attack by a judgment of the Supreme Court of Michigan, here challenged. He claims that he was deprived of his right to counsel to the extent that the Due Process Clause of the Fourteenth Amendment secures that right. The generalizations that are relevant to such a claim no longer call for elaboration. They have been set forth in a series of recent opinions.[1] It is now settled that, as to its administration of criminal justice, a State's duty to provide counsel, so far as the United States Constitution imposes it, is but one aspect of the comprehending guaranty of the Due Process Clause of a fair hearing on an accusation, including adequate opportunity to meet it. And so we turn to the facts of this case.

By information filed in the Circuit Court for Kalamazoo County, Michigan, on July 16, 1937, Charles Quicksall, the petitioner, was charged with the murder of one Grace Parker. She was a married woman, and Quicksall was her paramour. Petitioner had been a hospital patient, under police guard, between the time of Mrs. Parker's

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[1] *Betts* v. *Brady,* 316 U. S. 455; *Canizio* v. *New York,* 327 U. S. 82; *Carter* v. *Illinois,* 329 U. S. 173; *De Meerleer* v. *Michigan,* 329 U. S. 663; *Foster* v. *Illinois,* 332 U. S. 134; *Gayes* v. *New York,* 332 U. S. 145; *Marino* v. *Ragen,* 332 U. S. 561; *Bute* v. *Illinois,* 333 U. S. 640; *Wade* v. *Mayo,* 334 U. S. 672; *Gryger* v. *Burke,* 334 U. S. 728; *Townsend* v. *Burke,* 334 U. S. 736; *Uveges* v. *Pennsylvania,* 335 U. S. 437; *Gibbs* v. *Burke,* 337 U. S. 773.

death on July 2 and July 15, when he was taken before the Municipal Justice Court where, after waiving examination, he was bound over for trial. On arraignment the next day before the Kalamazoo Circuit Court he pleaded guilty to the charge of murder. There is no evidence that at the time of his plea petitioner requested counsel or that appointed counsel was offered him. The circumstances attending the plea were thus formally stated by the judge who received it:

> "The record may show that this respondent [petitioner] has just offered to plead guilty and has pleaded guilty to a charge of murder; that after a full statement by the respondent in response to numerous questions by the Court in open Court and after a private interview with respondent at chambers, in both of which he has freely and frankly discussed the details of this homicide as claimed by him, the Court being clearly satisfied that the plea of guilty is made freely, understandingly and voluntarily, an order has been entered accepting such plea of guilty." [2]

As required by the local law, the court then proceeded to inquire into the degree of crime. Mich. Stat. Ann. § 28.550 (Henderson 1938). The course of this inquiry is shown by a summary of what developed. Quicksall, who was forty-four years old at the time, had been mar-

[2] Mich. Stat. Ann. § 28.1058 (Henderson 1938) provides: "Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed."

ried and divorced twice. He had served penitentiary terms in Ohio and Michigan. He had lived with the Parkers in Ohio and in Kalamazoo, and he had become "intimate" with Mrs. Parker. She and Quicksall had made an agreement that if they "ever got caught" in their "unlawful intimate relationship" they "would die together." About a week before Mrs. Parker's death on July 2, petitioner was asked by her husband to leave his house, but on that day, at Mrs. Parker's request, he returned to see her. She told him that her husband had threatened to leave and divorce her, and she asked Quicksall to keep their agreement to die together. Thereupon she produced a revolver, and petitioner shot her and then himself. Neighbors who reached the Parker house shortly thereafter saw Mrs. Parker, very near death, lying on a bed, with a revolver near her. On being asked who shot her, she replied, "Charley did." Petitioner was lying on the floor, unconscious, next to the bed. A deputy sheriff who searched the premises found a note on the dresser in the bedroom reading: "July 2, 1937. I am dying, Grace and I together, because we cannot live apart. Charles Quicksall."

At the conclusion of these proceedings the court stated:

> "In this case, the respondent [petitioner] having been arraigned on the information charging him with murder, and having pleaded guilty thereto and said plea of guilty having been accepted by the Court, after an exhaustive interview with the respondent both in open Court and at chambers, and the Court having proceeded with an examination of witnesses to determine the degree of the crime, after hearing the testimony of the witnesses Horace Cobb, Jessie Pierce, Cora Ketter and Charles Conner, and the testimony of the respondent, himself, unsworn, regarding the circumstances of this crime, and it appearing from the testimony of such witnesses and

> from the statement of the respondent that the killing was deliberate and premeditated, and under the testimony of the respondent himself that it was in pursuance of a suicide pact, so-called, the Court finds and determines that respondent is guilty of murder in the first degree, and it is, therefore, ordered and adjudged that respondent be and he is guilty of murder in the first degree."

Michigan, as is well known, having long ago abolished capital punishment, Quicksall was sentenced to solitary confinement at hard labor for life. Mich. Stat. Ann. § 28.548 (Henderson 1938).

Almost ten years after his sentence, on April 18, 1947, the petitioner asked the Circuit Court for Kalamazoo County to vacate it and to grant him a new trial. He claimed the sentence had a constitutional infirmity in that he did not have the assistance of counsel and was prevented from communicating with counsel of his choice while he was hospitalized. He also claimed that his plea of guilty had been induced by misrepresentations on the part of the prosecuting attorney and the sheriff who, he asserted, had told him that the charge against him was manslaughter for which his sentence would be from two to fifteen years.

The motion to vacate the sentence was heard before the same judge who had received his plea of guilty and sentenced him. Petitioner was asked whether he desired to have a lawyer in this proceeding, and he replied that he did not: "Well, your Honor, it took me a long time to prepare the motion, and I figure that I would be just as well qualified to present it myself." In answering questions propounded by the judge, petitioner admitted that he knew he had been bound over on a murder charge. He also recalled that after the judge had informed him that his guilt had been determined to be of murder in the first degree he was given full opportunity to say

what he had to say before sentence was imposed, but had nothing to say. Cf. *Canizio* v. *New York,* 327 U. S. 82. However, he professed not to be able to recall details of the proceedings because of illness at the time. A deputy sheriff who had guarded petitioner during his hospitalization after the shooting testified that on the following day petitioner had said to him: "How long will I have to lay here? I wish to Christ it had taken effect on me like it did on her. If I get over this it will mean life for me anyway." Notes made contemporaneously supported this testimony. The prosecuting attorney at the time of sentencing was by reason of paralysis unavailable as a witness. The sheriff testified that neither he nor the prosecuting attorney, so far as he had knowledge, had refused petitioner permission to communicate with his family, friends, or a lawyer. Petitioner cross-examined the sheriff, but declined to question the deputy sheriff.

The trial judge took no stock in the reconstructing memory of the petitioner and denied his motion. The Supreme Court of Michigan affirmed. 322 Mich. 351, 33 N. W. 2d 904. We brought the case here out of a zealous regard for due observance of the safeguards of the Fourteenth Amendment in the enforcement of a State's penal code. 336 U. S. 916. The record exacts the holding that the petitioner has failed to sustain the burden of proving such a disregard of fundamental fairness in the imposition of punishment by the State as alone would justify this Court to invalidate the sentence by reason of the Due Process Clause.

Petitioner makes no claim that he did not know of his right to be assisted by counsel, see Mich. Stat. Ann. § 28.854 (Henderson 1938), and in view of his "intelligence, his age, and his earlier experiences in court," the Supreme Court of Michigan rejected the notion that he was not aware of his right to be represented by an attorney. 322 Mich. at 355, 33 N. W. 2d at 906. Cf. *Gryger*

v. *Burke,* 334 U. S. 728, 730. Since the Michigan courts disbelieved petitioner's allegations that he had not been allowed to communicate with his family, his friends or a lawyer, and no request was made by him for legal aid, the only question is whether, in the circumstances of this case, the failure of the record to show that he was offered counsel offends the Due Process Clause.

At least "when a crime subject to capital punishment is not involved, each case depends on its own facts." *Uveges* v. *Pennsylvania,* 335 U. S. 437, 441; *Betts* v. *Brady,* 316 U. S. 455, 462. To invalidate a plea of guilty the prisoner must establish that "for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement." *Foster* v. *Illinois,* 332 U. S. 134, 137; see *Gibbs* v. *Burke,* 337 U. S. 773, 781. Here petitioner's claim that the consequences of his plea of guilty had been misrepresented was disbelieved by the tribunal especially qualified to sit in judgment upon its credibility. See *Wade* v. *Mayo,* 334 U. S. 672, 683–84. In the light of what emerged in this proceeding upon a scrutiny of what took place before the same judge ten years earlier, when petitioner's plea of guilty was tendered and accepted, it would stultify the Due Process Clause to find that any right of the petitioner was infringed by the sentence which he incurred.[3] *Foster* v. *Illinois, supra* at 138; *Bute* v. *Illinois,* 333 U. S. 640, 670–74.

Affirmed.

Mr. Justice Black dissents.

Mr. Justice Douglas took no part in the consideration or decision of this case.

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[3] Assertions now made concerning irregularities in the hearing on the degree of the crime were not urged before the Michigan courts. They cannot be considered here for the first time, even as to their supposed bearing on the right to counsel.

SKELLY OIL CO. ET AL. *v.* PHILLIPS PETROLEUM CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 221. Argued December 9, 1949.—Decided June 5, 1950.

Respondent oil company had contracts with three producers to purchase gas for resale to a pipeline company which had applied to the Federal Power Commission for a certificate of public convenience and necessity under the Natural Gas Act. Each contract provided for termination by the producer upon notice to the respondent at any time after December 1, 1946, "but before the issuance of such certificate." On November 30, 1946, the Commission ordered that a certificate of public convenience and necessity be issued to the pipeline company, upon specified terms and conditions. The order was not made public until December 2, 1946, on which day the producers severally notified respondent of the termination of their contracts. Alleging that a certificate of public convenience and necessity, "within the meaning of said Natural Gas Act and said contracts," had been issued prior to the attempt to terminate the contracts, respondent sued the three producers in the Federal District Court under the Declaratory Judgment Act for a declaration that the contracts were still "in effect and binding upon the parties thereto." The decree of the District Court that the contracts had not been effectively terminated and were still in full force and effect was affirmed by the Court of Appeals. *Held:*

1. The matter in controversy as to which the respondent asked for a declaratory judgment is not one that "arises under" the laws of the United States; and since, as to two of the defendant producers, there was no diversity of citizenship, the proceedings against them should have been dismissed for want of jurisdiction. Pp. 671–674.

(a) By the Declaratory Judgment Act, Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. Pp. 671–672.

(b) Where the existence of a federal question is the basis of federal jurisdiction, such a federal question must be presented

by the plaintiff's claim itself, unaided by allegations in anticipation of defenses which might be interposed. P. 672.

2. There being diversity of citizenship in the case of the third producer defendant, the District Court had jurisdiction of the suit as to it. P. 674.

(a) There being diversity of citizenship between respondent and this defendant, and the venue being properly laid in the State where the suit was brought, the case was properly in the District Court. P. 674.

(b) That the declaratory remedy which may be given by the federal court may not be available in the state courts is immaterial. P. 674.

3. As to the third producer defendant, the judgment of the Court of Appeals is vacated and the cause is remanded, in order that the Court of Appeals, either itself or by sending the case back to the District Court, may further explore the issues through ways that may be appropriate. Pp. 674–679.

In a suit under the Federal Declaratory Judgment Act, the District Court decreed that the contracts between respondent and petitioners had not been terminated and remained in full force and effect. The Court of Appeals affirmed. 174 F. 2d 89. This Court granted certiorari. 338 U. S. 846. As to one of the petitioners, the judgment is vacated and the cause remanded; as to the other two petitioners, the judgment is reversed with directions that the cause be dismissed. P. 679.

Charles L. Black argued the cause for petitioners. With him on the brief were *W. P. Z. German, Alvin F. Molony, Hawley C. Kerr, Donald Campbell, Ray S. Fellows, Dan Moody, Walace Hawkins, Earl A. Brown* and *Raymond M. Myers.*

Harry D. Turner argued the cause for respondent. With him on the brief were *Don Emery, Rayburn L. Foster, George L. Sneed, S. E. Floren, Jr.* and *Eugene O. Monnett.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In 1945, Michigan-Wisconsin Pipe Line Company sought from the Federal Power Commission a certificate of public convenience and necessity, required by § 7 (c) of the Natural Gas Act, 52 Stat. 825, as amended, 15 U. S. C. § 717f (c), for the construction and operation of a pipe line to carry natural gas from Texas to Michigan and Wisconsin. A prerequisite for such a certificate is adequate reserves of gas. To obtain these reserves Michigan-Wisconsin entered into an agreement with Phillips Petroleum Company on December 11, 1945, whereby the latter undertook to make available gas from the Hugoton Gas Field, sprawling over Kansas, Oklahoma and Texas, which it produced or purchased from others. Phillips had contracted with petitioners, Skelly Oil Company, Stanolind Oil and Gas Company, and Magnolia Petroleum Company, to purchase gas produced by them in the Hugoton Field for resale to Michigan-Wisconsin. Each contract provided that "in the event Michigan-Wisconsin Pipe Line Company shall fail to secure from the Federal Power Commission on or before [October 1, 1946] a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller [a petitioner] shall have the right to terminate this contract by written notice to Buyer [Phillips] delivered to Buyer at any time after December 1, 1946, but before the issuance of such certificate." The legal significance of this provision is at the core of this litigation.

The Federal Power Commission, in response to the application of Michigan-Wisconsin, on November 30, 1946, ordered that "A certificate of public convenience and necessity be and it is hereby issued to applicant [Michigan-Wisconsin], upon the terms and conditions of this order," listing among the conditions that there be no transporta-

tion or sale of natural gas by means of the sanctioned facilities until all necessary authorizations were obtained from the State of Wisconsin and the communities proposed to be served, that Michigan-Wisconsin should have the approval of the Securities and Exchange Commission for its plan of financing, that the applicant should file for the approval of the Commission a schedule of reasonable rates, and that the sanctioned facilities should not be used for the transportation of gas to Detroit and Ann Arbor except with due regard for the rights and duties of Panhandle Eastern Pipe Line Company, which had intervened before the Federal Power Commission, in its established service for resale in these areas, such rights and duties to be set forth in a supplemental order. It was also provided that Michigan-Wisconsin should have fifteen days from the issue of the supplemental order to notify the Commission whether the certificate "as herein issued is acceptable to it." Finally, the Commission's order provided that for purposes of computing the time within which applications for rehearing could be filed, "the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later." 5 F. P. C. 953, 954, 956.

News of the Commission's action was released on November 30, 1946, but the actual content of the order was not made public until December 2, 1946. Petitioners severally, on December 2, 1946, gave notice to Phillips of termination of their contracts on the ground that Michigan-Wisconsin had not received a certificate of public convenience and necessity. Thereupon Michigan-Wisconsin and Phillips brought suit against petitioners in the District Court for the Northern District of Oklahoma. Alleging that a certificate of public convenience and necessity, "within the meaning of said Natural Gas Act and said contracts" had been issued prior to petitioners' at-

tempt at termination of the contracts, they invoked the Federal Declaratory Judgment Act for a declaration that the contracts were still "in effect and binding upon the parties thereto." Motions by petitioners to have Michigan-Wisconsin dropped as a party plaintiff were sustained, but motions to dismiss the complaint for want of jurisdiction were denied. The case then went to the merits, and the District Court decreed that the contracts between Phillips and petitioners had not been "effectively terminated and that each of such contracts remain [*sic*] in full force and effect." The Court of Appeals for the Tenth Circuit affirmed, 174 F. 2d 89, and we brought the case here, 338 U. S. 846, because it raises in sharp form the question whether a suit like this "arises under the Constitution, laws or treaties of the United States," 28 U. S. C. § 1331, so as to enable District Courts to give declaratory relief under the Declaratory Judgment Act. 48 Stat. 955, as amended, now 28 U. S. C. § 2201.

"[T]he operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240. Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, "jurisdiction" means the kinds of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act. Prior to that Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plain-

tiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified. See *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, 300; *Colegrove* v. *Green,* 328 U. S. 549, 551–52.

If Phillips sought damages from petitioners or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would "arise" under the State law governing the contracts. Whatever federal claim Phillips may be able to urge would in any event be injected into the case only in anticipation of a defense to be asserted by petitioners. "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gully* v. *First National Bank,* 299 U. S. 109, 115; compare 28 U. S. C. § 1257, with 28 U. S. C. § 1331. Ever since *Metcalf* v. *Watertown,* 128 U. S. 586, 589, it has been settled doctrine that where a suit is brought in the federal courts "upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character." But "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." *Tennessee* v. *Union & Planters' Bank,* 152 U. S. 454, 464. The plaintiff's claim itself must present a federal question "unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor* v. *Anderson,* 234 U. S. 74, 75–76; *Louisville & Nashville R. Co.* v. *Mottley,* 211 U. S. 149, 152.

These decisions reflect the current of jurisdictional legislation since the Act of March 3, 1875, 18 Stat. 470, first entrusted to the lower federal courts wide jurisdiction in cases "arising under this Constitution, the Laws of the United States, and Treaties." U. S. Const. Art. III, § 2. "The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts [which became the District Courts] of the United States." *Tennessee* v. *Union & Planters' Bank, supra* at 462. See also *Arkansas* v. *Kansas & Texas Coal Co.,* 183 U. S. 185, 188, and *Gully* v. *First National Bank, supra* at 112–14. With exceptions not now relevant Congress has narrowed the opportunities for entrance into the federal courts, and this Court has been more careful than in earlier days in enforcing these jurisdictional limitations. See *Gully* v. *First National Bank, supra* at 113.

To be observant of these restrictions is not to indulge in formalism or sterile technicality. It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law. Not only would this unduly swell the volume of litigation in the District Courts but it would also embarrass those courts—and this Court on potential review—in that matters of local law may often be involved, and the District Courts may either have to decide doubtful questions of State law or hold cases pending disposition of such State issues by State courts. To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation

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by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act. See *Developments in the Law—Declaratory Judgments—1941–1949,* 62 Harv. L. Rev. 787, 802–03 (1949). Since the matter in controversy as to which Phillips asked for a declaratory judgment is not one that "arises under the . . . laws . . . of the United States" and since as to Skelly and Stanolind jurisdiction cannot be sustained on the score of diversity of citizenship, the proceedings against them should have been dismissed.

As to Magnolia, a Texas corporation, a different situation is presented. Since Phillips was a Delaware corporation, there is diversity of citizenship. Magnolia had qualified to do business in Oklahoma and appointed an agent for service of process in accordance with the prevailing Oklahoma statute. Okla. Stat. Ann. tit. 18, § 452 (1937). Magnolia claimed that the subject matter of this proceeding did not arise in Oklahoma within the meaning of its consent to be sued. This contention was rejected below, and we do not reexamine the local law as applied by the lower courts. Under the doctrine of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.,* 308 U. S. 165, venue was properly laid in Oklahoma; that the declaratory remedy which may be given by the federal courts may not be available in the State courts is immaterial.

Therefore, in the case of Magnolia we must reach the merits. They relate to two matters: (1) the clause in the contract with Phillips permitting its termination at any time after December 1, 1946, but before the "issuance" of "a certificate of public convenience and necessity" by the Federal Power Commission; and (2) whether this provision was satisfied by Magnolia's notice of termination of December 2, 1946, despite the Commission's order of November 30, 1946. The phraseology "certificate of

public convenience and necessity" in the contract is identic with the phrase in § 7 (c) of the Natural Gas Act. The Court of Appeals equated the term of the contract with that in the statute and in effect deemed its problem to be the proper construction of what constitutes the "issuance" of a "certificate of public convenience and necessity" within the meaning of § 7 (c). So viewing the matter, the court held that the order of November 30, 1946, satisfied the requirement of the contract, and that therefore a certificate of public convenience and necessity had been issued within the terminal period of the contract, and that its termination was not timely.

It will be recalled that the order of November 30, 1946, had three parts: (A) it stated that "A certificate of public convenience and necessity be and it is hereby issued to applicant [Michigan-Wisconsin]"; (B) it imposed certain conditions upon the grant, some of which were to be set forth in a supplemental order; and (C) it said that "For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later." 5 F. P. C. at 954, 956. The course of reasoning by which the Court of Appeals concluded that the order of November 30, 1946, satisfied the statutory requirement for a certificate of public convenience and necessity can be briefly summarized. It relied on the grammatical argument that the Commission used the present tense in its order and subsequently referred to it as an order "issuing a certificate of public convenience and necessity," *e. g.*, 6 F. P. C. 1, 37; the conditional nature of the order was not deemed to impair its efficacy since § 7 (e) of the Natural Gas Act authorized the Commission "to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public

convenience and necessity may require"; and the provision of the order connecting the date of the order's issuance with the time defined for securing a rehearing was thought relevant only to the supplemental order.

We are not persuaded now to rest decision on the analysis of the Court of Appeals which led to its conclusion. We need not linger long on the merely grammatical argument of that court; it is given more weight than it can bear. Of course, the Commission has considerable administrative discretion to decide when an order may fairly be deemed to have been "issued." Section 16 of the Act provides that "Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe." But surely a certificate cannot be said to have been issued for purposes of defining rights and the seeking of reconsideration by an aggrieved person if its substance is merely in the bosom of the Commission. Knowledge of the substance must to some extent be made manifest. Here the content of the order of November 30, 1946, was not made public until December 2, 1946, the date of the termination notice.

The Commission itself in its rule for computing rehearing time distinguishes between "adoption" of an order and its "issuance."[1] However, as a matter of

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[1] Rule 13 (b) of the Commission's Rules of Practice and Procedure provides: "In computing any period of time involving the date of the issuance of an order by the Commission, the day of issuance of an order shall be the day the Office of the Secretary mails or delivers copies of the order (full text) to the parties or their attorneys of record, or makes such copies public, whichever be the earlier. . . . The day of issuance of an order may or may not be the day of its adoption by the Commission." 18 C. F. R. § 1.13 (b). A deposition taken of the Secretary of the Commission gave light on this point. The Commission's previous rule on rehearing time is in 18 C. F. R. Cum. Supp. § 50.75.

Rule 13 (c) provides: "Orders of the Commission shall be effective as of the dates of issuance unless otherwise specifically provided in

usage, the Commission has referred to an order as having "issued" a certificate on a particular date when in fact the date was that of "adoption." See, *e. g., Arkansas Louisiana Gas Co.*, 5 F. P. C. 813, 897; cf. *Pacific Gas & Elec. Co.*, 5 F. P. C. 824, 901. Finally, the restriction of the Court of Appeals of the rehearing provision of Part C to the supplemental order finds no support on the face of the order of November 30, 1946. There is nothing to indicate that Part C was not to apply to the entire order for purposes of § 19 of the Act, which allows a rehearing by a party aggrieved "within thirty days after the issuance of such order" and makes such rehearing a prerequisite to judicial review. See 6 F. P. C. 323.

Since the requirements of the Natural Gas Act for the issuance of "a certificate of public convenience and necessity" may be distributive in scope, varying with the different contexts in which the question must be examined, this is not the occasion to decide that these requirements have a single uniform content. Whether the statutory requirement here was satisfied is not a question of fact, the finding of which by the District Court is to be respected unless clearly erroneous. The District Court merely found that the content of the piece of paper dated November 30, 1946, was that day agreed upon in executive session of the Commission and that that fact was made known. But this leaves untouched the legal significance of this action of the Commission, and the Court ought not now in darkness to pronounce on this question.

We are not restricted to disposition of the controversy on so truncated a treatment of the issues that underlie the record. Considering the fact that so to dispose of the case

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the orders." 18 C. F. R. § 1.13 (c). This provision may be of significance if the effectiveness of a certificate is an issue in proceedings under § 20 or § 21 of the Act. The Court of Appeals did not discuss the bearing of these rules upon this case.

would involve determination of an important problem concerning a regulatory statute with implications of public importance that private litigants naturally enough do not wholly represent and that on these matters neither the courts below nor this Court had the benefit of the experience and illumination of the agency entrusted with the enforcement of the Act,[2] the due administration of justice requires that we should exercise our discretionary power in reviewing cases to "require such further proceedings to be had as may be just under the circumstances." 28 U. S. C. § 2106; *Honeyman* v. *Hanan,* 300 U. S. 14, 25. Accordingly, we think that the proper disposition requires that we vacate the judgment as to Magnolia and remand the case in order that the Court of Appeals either itself or by sending the case back to the District Court can further explore, through ways that may be appropriate, the issues which have been laid bare. See *Kennedy* v. *Silas Mason Co.,* 334 U. S. 249.

The impact of the litigation both here and below was on the proper construction of § 7 (c). Even though the language of the contract may be identic with that of § 7 (c), this language in the contract may have a scope independent of the proper construction of § 7 (c). The same words, in different settings, may not mean the same thing. Compare opinion of Mr. Justice Holmes in *Towne* v. *Eisner,* 245 U. S. 418, with his dissent in *Eisner* v. *Macomber,* 252 U. S. 189, 219. Parties do not necessarily endow statutory language in a contract with the scope of the statute, particularly when the same term may have variant meanings for different applications of the statute. See *Standard Oil Co.* v. *Johnson,* 316 U. S.

[2] The significance of the conditions in qualifying what is formally called a "certificate" in the order of November 30, 1946, is precisely one of those matters upon which Commission practice and experience may shed helpful light.

481, 483. Of course the statutory meaning in the context of the entire Natural Gas Act may not be irrelevant. In remanding the case we do not mean to foreclose this line of inquiry.[3]

In respect to Magnolia, the judgment of the Court of Appeals is vacated and the cause remanded for further proceedings not inconsistent with this opinion. As to Skelly and Stanolind, we reverse the judgment with directions that the cause be dismissed.

It is so ordered.

MR. JUSTICE BLACK agrees with the Court of Appeals and would affirm its judgment.

MR. JUSTICE DOUGLAS took no part in the consideration or disposition of this case.

MR. CHIEF JUSTICE VINSON, with whom MR. JUSTICE BURTON joins, dissenting in part.

I concur in that part of the Court's judgment that directs dismissal of the cause as to Skelly and Stanolind. I have real doubts as to whether there is a federal question here at all, even though interpretation of the contract between private parties requires an interpretation of a federal statute and the action of a federal regulatory

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[3] In its conclusions of law, the District Court stated: "The certificate issued by the Commission to Michigan-Wisconsin on November 30, 1946, although containing terms and conditions, was and is a certificate issued under the requirements of the Natural Gas Act and one that is provided for by that act. A consideration of the contracts between plaintiff and defendants, together with the contract between plaintiff and Michigan-Wisconsin, compels a conclusion that such certificate was one within the contemplation of the parties and satisfied the terms of the contracts."

The context suggests that in the second sentence the District Court may still have been focusing upon statutory meaning.

body. But the Court finds it unnecessary to reach that question because it holds that the federal question, if any, is not a part of the plaintiff's claim and that jurisdiction does not, therefore, attach. While this result is not a necessary one, I am not prepared to dissent from it at this time.

But I am forced to dissent from the vacation and remand of the cause in respect to Magnolia. I think that, as to this petitioner, the judgment of the Court of Appeals should be affirmed. The Court decides that the Court of Appeals erred in holding that the Federal Power Commission had issued a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company on November 30, 1946, despite the fact that on that date the Commission adopted an order stating that "A certificate of public convenience and necessity be and it is hereby issued to Applicant, upon the terms and conditions of this order, ..." This disregard for what the District Court found to be the Commission's express intention is based upon two alternative grounds. First, it is suggested that while the order issuing the certificate was "adopted" on November 30, it was not "issued" until December 2. Second, it is said that Part C of the November 30 order, which concerned the date of issuance of the order for purposes of applications for rehearing, precludes a finding that a certificate was issued on November 30. Neither of these grounds, in my judgment, supports the Court's conclusion.

As to the first, which was not argued here nor in the Court of Appeals, it is true that the Commission's rules provide that an *order* is not to be deemed "issued" until the full text is mimeographed and mailed to the parties to the proceeding. This usually follows within two or three days after the order is "adopted." The only purpose of the postponement of the date of issuance of the

order, so far as we are informed, is to postpone the running of the 30-day period for applications for rehearing until the full text is available to the parties who have standing to ask for rehearing.

But the Commission uniformly refers to the date of *adoption* of the order as the date upon which the certificate of public convenience and necessity was "issued." [1] It did so in this case, when, on March 12, 1947, it issued a supplemental order referring to its "order of November 30, 1946, issuing a certificate of public convenience and necessity." Furthermore, the District Court found as a fact that

> "On November 30, a Saturday, the Commission in executive session made an order granting, with conditions, a certificate of public convenience and necessity to the Michigan-Wisconsin Pipe Line Company. During this session as the members of the Commission came to agreement as to the wording of the order, Mr. Fuquay, the secretary of the Commission, prepared the order in full and exact text. The secretary was directed by the Commission to release the order immediately."

Following adjournment on that day, the secretary sent a telegram to the parties to the proceeding, informing them that the "Commission today . . . adopted Opinion and Order, in Docket No. G–669, issuing certificate, with conditions, to Michigan Wisconsin Pipe Line Company." On the same day, releases to the press were made announcing the action taken by the Commission.

Skelly, Stanolind and Magnolia were not parties to this proceeding. It may very well be that the date of issuance of the order granting the certificate is December

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[1] See, *e. g., Arkansas Louisiana Gas Co.,* 5 F. P. C. 813, 897; *Pacific Gas & Elec. Co.,* 5 F. P. C. 824, 901.

2 or some later date—for purposes of rehearing upon application of the parties. But I think there is no question that the certificate, as distinguished from the order, was issued on November 30. That is the Commission's view, as indicated by its supplemental order. The fact that it takes a few days to get its orders mimeographed and the Commission has adopted a rule that, in fairness to the parties, the time for rehearing shall not begin to run until such orders, in full text, are available, does not mean that the issuance of the certificate is also held in abeyance until that time.

The second argument requires but short answer. Part C provides that

> "For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later."

The paragraph means just what it says. I do not understand the Court to hold that the Commission cannot thus postpone the running of the time for rehearing. Computation of that time, as I have indicated, has no necessary relation to the date of issuance of the certificate.

I think that the Commission intended to and did issue a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company on November 30, 1946, whatever the date of its order, for purposes of computation of time for rehearing. The crucial clause of the contract refers to "the issuance of such certificate [of public convenience and necessity]." By their inclusion of a provision dependent upon the action of a federal agency, it is obvious that the parties intended that the contract should be construed with reference to the effec-

tive date of agency action under the statutes and the practices of the Commission. The District Court so concluded.[2] I can see no reason, therefore, to remand the cause for further proceedings. In my view, effective agency action was taken on November 30, 1946. As to Magnolia, I would affirm the judgment of the Court of Appeals.

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[2] The District Court stated as one of its conclusions of law: "The certificate issued by the Commission to Michigan-Wisconsin on November 30, 1946, although containing terms and conditions, was and is a certificate issued under the requirements of the Natural Gas Act and one that is provided for by that act. A consideration of the contracts between plaintiff and defendants, together with the contract between plaintiff and Michigan-Wisconsin, compels a conclusion that such certificate was one within the contemplation of the parties and satisfied the terms of the contracts."

SWIFT & COMPANY PACKERS ET AL. *v.* COMPANIA COLOMBIANA DEL CARIBE, S. A. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 230. Argued December 14–15, 1949.—Decided June 5, 1950.

Petitioners brought a libel *in personam* in the District Court for the Canal Zone against a steamship company on a claim arising upon a contract of affreightment supplemented by charges of negligence in the nondelivery of a sea cargo, and by process of foreign attachment secured the attachment of a vessel which the company allegedly had transferred to respondent in fraud of petitioners' rights. Concluding that there was no jurisdiction in admiralty to inquire into the alleged fraudulent transfer, and that in any event the exercise of jurisdiction would be inappropriate since the transfer had taken place between two foreign corporations and in a foreign country, the District Court vacated the attachment. The Court of Appeals affirmed. *Held:*

1. The order of the District Court vacating the attachment was reviewable by the Court of Appeals under 28 U. S. C. § 1291. Pp. 688–689.

(a) The provision of 28 U. S. C. § 1291 for appeals to the courts of appeals only from final decisions of the district courts should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541. Pp. 688–689.

2. In the circumstances of this case, the District Court to discharge its maritime jurisdiction was not without power to determine whether the transfer of the vessel was fraudulent, and the power should be exercised. Pp. 689–695.

3. In the posture of the case in the District Court, the vacation of the attachment was not justified by petitioners' failure to establish a *prima facie* case of fraud, although the ultimate burden of establishing a fraudulent transfer was upon them. Pp. 695–696.

4. The District Court's order vacating the attachment was not justified as an exercise of discretion to decline jurisdiction under the doctrine of *forum non conveniens*. Pp. 697–698.

(a) It was improper under the circumstances here shown to remit a United States citizen to the courts of a foreign country

without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court. Pp. 697–698.
175 F. 2d 513, reversed.

An order of the District Court vacating the attachment of a vessel in an admiralty proceeding, 83 F. Supp. 273, was affirmed by the Court of Appeals. 175 F. 2d 513. This Court granted certiorari. 338 U. S. 813. *Reversed and remanded,* p. 698.

Eberhard P. Deutsch argued the cause for petitioners. With him on the brief was *Harry F. Stiles, Jr.*

Nicholas J. Healy, 3rd argued the cause and filed a brief for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The question before us is the propriety of an order of the District Court for the Canal Zone vacating a foreign attachment of a vessel made in a libel *in personam.* We granted certiorari because important questions relating to the scope of admiralty jurisdiction and its exercise are in issue. 338 U. S. 813.

On March 7, 1948, the libel was filed against Compania Transmaritima Colombiana, S. A., a Colombian corporation, by Swift & Company Packers, a Nevada corporation, certain Cuban corporations and individuals, and a Colombian citizen. They brought the libel as owners of rice shipped from Ecuador to Cuba. It was alleged that the cargo had been delivered in good order to the *M/V Cali,* owned and operated by Transmaritima, and that the vessel had sunk, or partially sunk, off the island of Grand Cayman with resulting nondelivery of the cargo. This was supplemented by allegations of negligence. Process was prayed with the further request that if the respondent could not be found its goods and chattels

be attached, particularly a vessel known as the *Alacran,* or *Caribe.* This vessel was thereupon attached by the marshal.

On March 8, libellants filed a supplemental and amended libel, and on the basis of the following allegations joined the Compania Colombiana Del Caribe, S. A., as respondent. On or shortly prior to March 4, the Compania Del Caribe had been organized under the laws of Colombia and the *Alacran* had been transferred by Transmaritima to Del Caribe in fraud of the rights of libellants. The latter company had been organized by directors, officers and stockholders of Transmaritima, but no funds had been paid into its treasury for the issue of its stock, and the transfer of the *Alacran* was without real consideration. Del Caribe was "merely the creature or alter ego" of Transmaritima and "they should be held to be, as they are, one and the same." Del Caribe, on or about March 4, had had the vessel's name changed from *Alacran* to *Caribe,* and a new register had been issued accordingly. In the alternative, the claim was that Del Caribe was indebted to Transmaritima for at least a substantial part if not all of the purchase price of the *Caribe.*

Attachment of the vessel was again prayed on what appears to have been either of two grounds: since Transmaritima and Del Caribe were really one and the same, it mattered not which was deemed to be the owner of the *Caribe;* since the transfer of the *Caribe* to Del Caribe was a fraudulent transfer to be set aside, the vessel was in reality Transmaritima's property and Del Caribe should be garnished. On the basis of the amended libel another attachment of the *Caribe* was made.[1]

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[1] The marshal's return failed to state that respondents could not be found within the jurisdiction. Cf. *International Grain Ceiling Co.* v. *Dill,* 13 Fed. Cas. 70, No. 7,053, 10 Ben. 92. The Court of Appeals properly held this to be a formal defect, easily correctible on remand.

With the supplemental libel, libellants submitted a list of interrogatories to be propounded to Del Caribe, calculated to disclose the true status of that company and of the transfer to it of the *Caribe*. On March 15, respondents gave notice that they would move for an order dismissing the libel and vacating the attachment. An accompanying affidavit relied primarily on the doctrine of *forum non conveniens*. The District Court overruled this motion on March 31. The parties then entered into stipulations whereby the respondents' time to answer the libel and interrogatories was extended to June 17. On June 11, they answered, putting in issue various questions relating to the liability arising out of the sinking of the *Cali* and to the transfer of the *Caribe*. At the same time Del Caribe objected to the interrogatories on various grounds. No disposition of these objections appears from the record.

On August 16, Del Caribe gave notice of a motion to dismiss the libel as to it and vacate the attachment. Various grounds were urged calling into question the jurisdiction of the court, the propriety of its exercise, and the adequacy of the allegations to state a claim in the libel. An accompanying affidavit set forth matters relating to the transfer.

On September 20, the District Court found that the nondelivery of the cargo was due to the beaching of the *Cali* in January, 1948; that Del Caribe had been organized in the latter part of February, 1948; and that Transmaritima had sold and transferred the *Caribe* to Del Caribe on February 25.[2] From these facts the district judge concluded that there was no jurisdiction in admiralty to inquire into the relations between the two

[2] The district judge also found that the stockholders and managing officers of the two respondents were not identical, but these facts were irrelevant to his disposition of the case and are to the disposition made here.

respondent companies or the sale of the *Caribe*. In any event, the court declined to exercise jurisdiction to look into the transfer since it had taken place between two foreign corporations and in a foreign country. Accordingly, the attachment was ordered to be vacated. While libellants submitted additional evidence upon a rehearing, the court adhered to its original views. 83 F. Supp. 273.

The Court of Appeals affirmed. It held that jurisdiction to set aside a fraudulent transfer before judgment on the main claim was at best "doubtful," that there was discretion to decline jurisdiction on principles of *forum non conveniens,* and that, in any event, libellants had not sustained their burden of producing proof that the transfer was fraudulent.[3] 175 F. 2d 513.

This we believe to be a fair résumé of an uncommonly confused and opaque record. It is especially hampering that the record is not clearer than it is when legal issues of real complexity are in controversy.

I. There is a threshold question as to the jurisdiction of the court below to entertain the appeal. It is claimed that the order vacating the attachment was not a final order and therefore not reviewable.

We believe that the order comes squarely within the considerations of our recent decision in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541. The litigation arising out of the claim of the libellants has not run its entire course, but the order now here, like that in the *Cohen* case, "appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too impor-

[3] The District Court did not dismiss the garnishment proceeding against Del Caribe, since that company was allegedly indebted to Transmaritima and some of the property of the *Cali* had been attached aboard the *Caribe*. The Court of Appeals suggested that the issue of fraud in the transfer of the *Caribe* could be adjudicated as part of the garnishment proceeding.

tant to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U. S. at 546. Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible. Cf. *The Panaghia Kathariotisa,* 165 F. 2d 430. Under these circumstances the provision for appeals only from final decisions in 28 U. S. C. § 1291 should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process. See *Cobbledick* v. *United States,* 309 U. S. 323, 328–29. The situation is quite different where an attachment is upheld pending determination of the principal claim. Such was *Cushing* v. *Laird,* 107 U. S. 69, which is urged on us. In such a situation the rights of all the parties can be adequately protected while the litigation on the main claim proceeds.

II. On finding that the *Caribe* had been sold by Transmaritima to Del Caribe prior to the filing of the libel, the District Court deemed itself without jurisdiction to determine whether the transfer was fraudulent. In consequence it felt compelled to treat Del Caribe as the owner of the vessel, and since only the property of Transmaritima could be validly attached the attachment had to be vacated.[4]

The reasoning of the District Court was based on the view that a claim of fraud in the transfer of a vessel

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[4] Libellants also sought to hold Del Caribe personally liable for the destruction of the *Cali's* cargo of rice on the ground that it was merely the alter ego of Transmaritima. Success on this theory would render the issue of fraudulent transfer irrelevant, for then the assets of either company could be attached. The jurisdiction of a court of admiralty to determine the question of alter ego is undoubted. *The Willem Van Driel, Sr.,* 252 F. 35; *Luckenbach S. S. Co.* v. *W. R. Grace & Co.,* 267 F. 676; *Yone Suzuki* v. *Central Argentine R. Co.,*

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was a matter for determination by a court of equity and therefore outside the bounds of admiralty jurisdiction. There is a good deal of loose talk to this effect in the reports, concurrent with talk that courts of admiralty exercise their jurisdiction upon equitable principles. Even as to admiralty jurisdiction we must be wary of verbal generalizations unrelated to their applications. Not the least creative achievement of judicial law-making is the body of doctrines that has been derived from the brief words of the Constitution extending the judicial power "to all Cases of admiralty and maritime Jurisdiction." U. S. Const. Art. III, § 2. But it would be beyond human achievement even of a long line of judges especially equipped for dealing with admiralty matters to have produced a wholly harmonious body of admiralty law, or to have written opinions that should not have lent themselves through largeness or looseness of statement beyond the scope of their adjudications.

Unquestionably a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property. *E. g., The Eclipse,* 135 U. S. 599, 608, and cases cited. The reasoning of the District Court would be pertinent if the libellants, as creditors of Transmaritima, had gone into admiralty by way of a creditor's bill to set aside a pretended sale of the *Caribe* as a fraud-

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27 F. 2d 795, 806; *Kingston Dry Dock Co.* v. *Lake Champlain Transp. Co.,* 31 F. 2d 265; *Gardner* v. *Dantzler Lumber & Export Co.,* 98 F. 2d 478. But it is settled doctrine that, apart from any transfer of assets by Transmaritima to Del Caribe, the latter company could not be held personally liable on an alter ego theory, since it came into existence after the *Cali* sank. *Yone Suzuki* v. *Central Argentine R. Co., supra; Kingston Dry Dock Co.* v. *Lake Champlain Transp. Co., supra.*

It is important to note, however, that the relationship between the two respondent companies has an obvious relevance to the issue of fraudulent transfer.

ulent transfer. But that is not the case before us. Libellants went into admiralty on a claim arising upon a contract of affreightment supplemented by charges of negligence in the nondelivery of a sea cargo—matters obviously within admiralty jurisdiction. As an incident to that claim, in order to secure respondents' appearance and to insure the fruits of a decree in libellants' favor, they made an attachment under General Admiralty Rule 2.[5] The issue of fraud arises in connection with the attachment as a means of effectuating a claim incontestably in admiralty. To deny an admiralty court jurisdiction over this subsidiary or derivative issue in a litigation clearly maritime would require an absolute rule that admiralty is rigorously excluded from all contact with nonmaritime transactions and from all equitable relief, even though such nonmaritime transactions come into play, and such equitable relief is sought, in the course of admiralty's exercise of its jurisdiction over a matter exclusively maritime. It would be strange indeed thus to hobble a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce. Controversies between admiralty and common law are familiar legal history. See Mr. Justice Story's classic opinion in *De Lovio* v. *Boit,* 7 Fed. Cas. 418, No. 3,776, 2 Gall. 398; 4 Benedict on Admiralty cc. 61–63 (Knauth ed. 1940). We find no restriction upon admiralty by chan-

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[5] The relevant portion of General Admiralty Rule 2 is as follows:

"In suits *in personam* the mesne process shall be by a simple monition in the nature of a summons to appear and answer to the suit, or by a simple warrant of arrest of the person of the respondent in the nature of a capias, as the libellant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel to the amount sued for, if said respondent shall not be found within the District."

cery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction. Certainly there is no ground for believing that this restriction was accepted as a matter of course by the framers of the Constitution so that such sterilization of admiralty jurisdiction can be said to have been presupposed by Article III of the Constitution.

A few illustrative cases will take us out of the fog of generalities, for the decisions dealing with concrete situations afford a working approach even if not a rigid rule.

Nonmaritime contracts may be examined to determine whether they constitute a valid defense, although the same contracts will not support a libel or cross-libel for affirmative relief. *Armour & Co.* v. *Fort Morgan S. S. Co.*, 270 U. S. 253, 258–60. An equitable claim which does not support a possessory suit may be availed of as a valid defense against a similar suit by the holder of legal title. *Chirurg* v. *Knickerbocker Steam Towage Co.*, 174 F. 188; cf. *The Daisy*, 29 F. 300; see Morrison, *Remedial Powers of the Admiralty*, 43 Yale L. J. 1, 21 (1933). Admiralty cannot entertain a suit to reform a release from liability executed under a mutual mistake merely because it pertains to a maritime claim; but when such a release is pleaded in defense against assertion of that claim, admiralty is not barred from determining whether it was executed by the parties under mutual mistake. *Rice* v. *Charles Dreifus Co.*, 96 F. 2d 80. And so as to accounting, "It is true that a court of admiralty will not entertain a suit for an accounting as such: as, for example, an accounting between co-owners of a vessel, or between maritime adventurers, or between principal and agent . . . [citing cases]. Nevertheless, it has never been true, when an accounting is necessary to the complete adjustment of rights over which admiralty has independent jurisdiction, that it will suspend its remedies midway and require the

parties to resort to another court." *W. E. Hedger Transp. Corp.* v. *Ira S. Bushey & Sons, Inc.*, 155 F. 2d 321, 323, per Learned Hand, J.

In each of these cases a holding that admiralty must stay its hands as to a matter intrinsically nonmaritime but "necessary to the complete adjustment of rights over which admiralty has independent jurisdiction" would have seriously impaired the discharge by admiralty of the task which belongs to it. To recognize these subsidiary powers of admiralty to deal justly with the claims that are within its jurisdiction is not to enlarge the admiralty jurisdiction but to avoid its mutilating restriction. To generalize beyond this is to invite misleading or empty abstractions.

We can now see the immediate problem in its proper perspective. The process of foreign attachment is known of old in admiralty. It has two purposes: to secure a respondent's appearance and to assure satisfaction in case the suit is successful. *Manro* v. *Almeida*, 10 Wheat. 473, 489. While the process may be utilized only when a respondent is not found within the jurisdiction, an attachment is not dissolved by the subsequent appearance of respondent. See *Birdsall* v. *Germain Co.*, 227 F. 953, 955; 2 Benedict on Admiralty § 290 (Knauth ed. 1940). Disputes over ownership of attached vessels are of course inevitable since only the respondent's property may be attached. *E. g., Cushing* v. *Laird*, 107 U. S. 69; cf. *McGahern* v. *Koppers Coal Co.*, 108 F. 2d 652; *Kingston Dry Dock Co.* v. *Lake Champlain Transp. Co.*, 31 F. 2d 265. Inevitably such disputes may involve transactions not themselves the subject matter of an independent libel. If jurisdiction be wanting in a court of admiralty when such a controversy arises in the context of an attachment made in a libel over which the court indubitably has jurisdiction, a congenital defect would have to be attributed to the ancient process of foreign attachment. If colorable transfers of property were immune to challenge in

a court of admiralty when a libel *in personam* has been brought in a District where the respondent cannot be personally served, admiralty jurisdiction would be sacrificed to a sterile theory of judicial separatism. No support for such a conclusion is to be found in any decision of this Court or in those of the lower courts which have had so large a share in the development of admiralty law. The relevant rulings look the other way.

In *Lee* v. *Thompson,* 15 Fed. Cas. 233, No. 8,202, 3 Woods 167, Mr. Justice Bradley held that an admiralty court had power to look into an allegedly fraudulent transfer where the question was relevant to execution upon a decree in admiralty. He fully recognized that a libel based solely on the transfer could not be maintained, but where that issue was "incidental to its general jurisdiction, and for maintaining the same, it [the admiralty court] has plenary power to decide, and frequently does decide, conflicting claims to property. Without such power its jurisdiction would often be defeated." 15 Fed. Cas. at 235; 3 Woods at 173. The force of Mr. Justice Bradley's decision is sought to be cut down in that it dealt with execution on a judgment and not with an attachment.[6] The fact is, however, that Mr. Justice Bradley relied in his reasoning on the process of foreign attachment, and reason rejects any significant distinction between the jurisdiction of admiralty to inquire into a fraudulent transfer in the two situations. In both admiralty is not seized of jurisdiction to correct a fraud simply because it is a fraud; that's the business of equity. The basis of admiralty's power is to protect its jurisdiction from being thwarted by a fraudulent transfer, and that applies equally whether it is concerned

[6] The Court of Appeals apparently regarded this distinction as important, for it held that the issues relating to the vessel *Caribe* might be adjudicated in the garnishment proceeding but not in connection with the attachment.

with executing its judgment or authorizing an attachment to secure an independent maritime claim. Cf. *The New York,* 113 F. 810; *The Columbia,* 100 F. 890 (judgment in admiralty vacated because obtained by fraud).

We must conclude that the District Court was not without power to look into the transfer of the *Caribe* under the circumstances of this suit. But because power exists, its use is not inexorable. Cf. *Massachusetts* v. *Missouri,* 308 U. S. 1, 19. We would be passing on situations not before us were we to attempt now to define when power which we recognize should be withheld. In the circumstances of this case the power should be exercised, for there are good reasons for the attachment. If the libellants are ultimately successful, judgment may well avail them nothing unless duly secured. Cf. *Asiatic Petroleum Corp.* v. *Italia Societa Anonima Di Navigazione,* 119 F. 2d 610. The issues of fact on which libellants' claim of fraud turn do not appear to be complicated and they may be speedily adjudicated by the District Court prior to a hearing on the affreightment contract.

III. It is urged that, even if there existed power to ascertain whether the transfer was fraudulent, vacation of the attachment was justified by libellants' failure to establish a *prima facie* case of fraud. No doubt, the ultimate burden of establishing a fraudulent transfer was upon libellants. See *Cushing* v. *Laird,* 107 U. S. 69, 83–84. Under Admiralty Rule 23 of the District Court for the Canal Zone,[7] the district judge might have required

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[7] The relevant portion of Rule 23 is as follows:

"In case of the attachment of property . . . the party arrested or any person having a right to intervene in respect of the thing attached, may, upon evidence showing any improper practice or a manifest want of equity on the part of the libellant, have an order from the judge requiring the libellant to show cause instanter why the arrest or attachment should not be vacated." See 5 Benedict on Admiralty (Whitman ed. 1949) 234.

libellants to present their proof in order to determine whether substantial questions of fact were raised respecting the fraudulence of the transfer. Had libellants then failed to respond without adequate reason, the attachment would properly have been vacated.

Rule 23 was in substance invoked by respondents, as the Court of Appeals held, but the record does not support the view that its invocation put libellants to their proof that the transfer was fraudulent. They had no reason to believe that such proof was needed before trial. Neither of the two motions of respondents to vacate the attachment rested on an absence of fraud as a matter of fact. Respondents presented evidence through affidavits that a new corporation had been formed and a transfer of title to the vessel effected, but this was only to support their charges that the court lacked jurisdiction, that in any event it should decline jurisdiction under principles of *forum non conveniens,* and that the allegations in the libel did not state a cause of action. Nor were libellants put on notice by the District Court's first opinion to put in proof on rehearing. Its holding was based on lack of jurisdiction to inquire into the transfer or, alternatively, on discretion to decline its exercise. Quite clearly it did not determine the issue of fraud in the transfer. The opinion denying rehearing did not break new ground. On these facts, the attachment could not be vacated for a failure of libellants to support their charge of a fraudulent transfer.[8]

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[8] The eight months intervening between the filing of the libel and the opinion on rehearing were spent largely on respondents' motions and to afford respondents opportunity to file answers. It is also pertinent that libellants' interrogatories to Del Caribe were never answered and the exceptions taken to them never passed on by the District Court. The evidence contained in respondents' affidavits was inadequate to support any determination of the fraud issue. Of course, if the court had required libellants to present such proof

IV. There remains the question whether the District Court's order may be justified as an exercise of discretion to decline jurisdiction under the doctrine of *forum non conveniens*. The doctrine is of long standing in admiralty, but this Court has not previously had to apply it to a suit brought by a United States citizen. Such application has been rare even in the lower federal courts. Cf. *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413; *United States Merchants' & Shippers' Ins. Co.* v. *A/S Den Norske Afrika OG Australie Line*, 65 F. 2d 392; see Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 920–21 (1947); Bickel, *Forum Non Conveniens in Admiralty*, 35 Cornell L. Q. 12, 41–47 (1949). We need not now decide the abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens. Discretion could not sustain declination in this case. Application of *forum non conveniens* principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners.[9] The District Court gave no indication that it recognized such considerations. Its opinion indicates that in so far as it may have exercised discretion to decline jurisdiction it was moved to do so by its view that such jurisdiction does not exist. But, in any event, it was improper under the circumstances here shown to remit a United States citizen to the courts of a foreign country without assuring the citizen that respondents

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as they had, it would have been for them to move that the exceptions to the interrogatories be overruled. But, as indicated, the importance of such a move was never made clear.

[9] Compare *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U. S. 518, 524: "In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." See also *O'Neill* v. *Cunard White Star, Ltd.*, 160 F. 2d 446.

would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court. The power of the District Court to give a libellant such assurance is shown by *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413, 424. See also *The City of Agra*, 35 F. Supp. 351. While the District Court exercised discretion to vacate only the attachment and not to dismiss the entire libel, libellants' rights were seriously impaired by their loss of security. The importance of the right to proceed by attachment to afford security has been emphasized. *E. g., In re Louisville Underwriters*, 134 U. S. 488; *Asiatic Petroleum Corp.* v. *Italia Societa Anonima Di Navigazione*, 119 F. 2d 610. Libellants' right to maintain the attachment will depend on their ability to prove fraud in the transfer of the *Caribe* upon a hearing. They are entitled to have that hearing.

The case must be reversed and remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

Syllabus.

UNITED STATES *v.* LOUISIANA.

NO. 12, ORIGINAL.

Argued March 27, 1950.—Decided June 5, 1950.

1. In this suit, brought in this Court by the United States against the State of Louisiana under Art. III, § 2, Cl. 2 of the Constitution, *held:* The United States is entitled to a decree adjudging and declaring the paramount rights of the United States as against Louisiana in the area claimed by Louisiana which lies under the Gulf of Mexico beyond the low-water mark on the coast of Louisiana and outside of the inland waters, enjoining Louisiana and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring Louisiana to account for the money derived by it from the area after June 23, 1947. *United States* v. *California,* 332 U. S. 19. Pp. 700–706.

   (a) *Toomer* v. *Witsell,* 334 U. S. 385; *New Orleans* v. *United States,* 10 Pet. 662; *Pollard's Lessee* v. *Hagan,* 3 How. 212, distinguished. P. 704.

   (b) The marginal sea is a national, not a state, concern, and national rights are paramount in that area. *United States* v. *California, supra.* P. 704.

   (c) Prior to its admission to the Union, Louisiana had no stronger claim to ownership of the marginal sea than the original thirteen colonies or California; and Louisiana stands on no better footing than California, so far as the three-mile belt is concerned. P. 705.

   (d) Since the three-mile belt off the shore is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the area claimed by Louisiana extending 24 miles seaward beyond the three-mile belt is also in the domain of the Nation rather than that of Louisiana. Pp. 705–706.

2. In ruling on a motion for leave to file the complaint in this case, 337 U. S. 902, this Court held, in effect, that Art. III, § 2, Cl. 2 of the Constitution, granting this Court original jurisdiction in cases "in which a State shall be Party," includes cases brought by the United States against a State, notwithstanding a claim that the States have not consented to be sued by the Federal Government. Pp. 701–702.

3. In ruling on a demurrer and motions filed by the State of Louisiana, 338 U. S. 806, this Court held, in effect, that it had original jurisdiction of the parties and the subject matter; that lessees of oil, gas and other similar rights in the disputed area are not indispensable parties to the case; and that Louisiana was not entitled to a more definite statement of the claim of the United States or to a bill of particulars. P. 702.
4. This being an equity suit for an injunction and accounting, Louisiana was not entitled to a jury trial. Even if the Seventh Amendment and 28 U. S. C. § 1872 extend to cases under the original jurisdiction of this Court, they require jury trials only in actions at law. P. 706.

The case and the earlier proceedings herein are stated in the opinion at pp. 700–703. The conclusion that the United States is entitled to the relief prayed for is reported at p. 706.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Attorney General McGrath, Assistant Attorney General Vanech, Arnold Raum, Oscar H. Davis, Robert E. Mulroney, Robert M. Vaughan, Frederick W. Smith* and *George S. Swarth.*

L. H. Perez and *Cullen R. Liskow* argued the cause for the defendant. With them on the brief were *Bolivar E. Kemp, Jr.,* Attorney General of Louisiana, *John L. Madden,* Assistant Attorney General, *Stamps Farrar, Bailey Walsh* and *F. Trowbridge vom Baur.*

Mr. Justice Douglas delivered the opinion of the Court.

The United States by its Attorney General and its Solicitor General brought this suit against the State of Louisiana, invoking our jurisdiction under Art. III, § 2, Cl. 2 of the Constitution which provides "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction."

The complaint alleges that the United States was and is

> "the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana and outside of the inland waters, extending seaward twenty-seven marine miles and bounded on the east and west, respectively, by the eastern and western boundaries of the State of Louisiana."

The complaint further alleges that Louisiana, claiming rights in that property adverse to the United States, has made leases under her statutes to various persons and corporations which have entered upon said lands, drilled wells for the recovery of petroleum, gas and other hydrocarbon substances, and paid Louisiana substantial sums of money in bonuses, rent, and royalties, but that neither Louisiana nor its lessees have recognized the rights of the United States in said property.

The prayer of the complaint is for a decree adjudging and declaring the rights of the United States as against Louisiana in this area, enjoining Louisiana and all persons claiming under it from continuing to trespass upon the area in violation of the right of the United States, and requiring Louisiana to account for the money derived by it from the area subsequent to June 23, 1947.

Louisiana opposed the motion for leave to file the complaint, contending that the States have not consented to be sued by the Federal Government and that *United States* v. *Texas,* 143 U. S. 621, which held that Art. III, § 2, Cl. 2 of the Constitution, granting this Court original jurisdiction in cases "in which a State shall be Party," includes cases brought by the United States against a State should be overruled. We heard argument on the

motion for leave to file and thereafter granted it. 337 U. S. 902, rehearing denied, 337 U. S. 928.

Louisiana then filed a demurrer asserting that the Court has no original jurisdiction of the parties or of the subject matter. She moved to dismiss on the ground that the lessees are indispensable parties to the case; and she also moved for a more definite statement of the claim of the United States and for a bill of particulars. The United States moved for judgment. The demurrer was overruled, Louisiana's motions denied, and the motion of the United States for judgment was denied, Louisiana being given 30 days in which to file an answer. 338 U. S. 806.

In her answer Louisiana admits that "the United States has paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico adjacent to the coast of Louisiana, to the extent of all governmental powers existing under the Constitution, laws and treaties of the United States," but asserts that there are no conflicting claims of governmental powers to authorize the use of the bed of the Gulf of Mexico for the purpose of searching for and producing oil and other natural resources, on which the relief sought by the United States depends, since the Congress has not adopted any law which asserts such federal authority over the bed of the Gulf of Mexico. Louisiana therefore contends that there is no actual justiciable controversy between the parties. Louisiana in her answer denies that the United States has a fee simple title to the lands, minerals, and other things underlying the Gulf of Mexico. As affirmative defenses Louisiana asserts that she is the holder of fee simple title to all the lands, minerals, and other things in controversy; and that since she was admitted into the Union in 1812, she has exercised continuous, undisturbed and unchallenged sovereignty and possession over the property in question.

Louisiana also moved for trial by jury. She asserts that this suit, involving title to the beds of tide waters, is essentially an action at law and that the Seventh Amendment and 62 Stat. 953, 28 U. S. C. § 1872, require a jury.[1]

The United States then moved for judgment on the ground that Louisiana's asserted defenses were insufficient in law. We set the case down for argument on that motion.

The territory out of which Louisiana was created was purchased by the United States from France for $15,000,000 under the Treaty of April 30, 1803, 8 Stat. 200. In 1804 the area thus acquired was divided into two territories, one being designated as the Territory of Orleans, 2 Stat. 283. By the Enabling Act of February 20, 1811, 2 Stat. 641, the inhabitants of the Territory of Orleans were authorized to form a constitution and a state government. By the Act of April 8, 1812, 2 Stat. 701, 703, Louisiana was admitted to the Union "on an equal footing with the original states, in all respects whatever." And as respects the southern boundary, that Act recited that Louisiana was "bounded by the said gulf [of Mexico] . . . including all islands within three leagues of the coast."[2] In 1938 Louisiana by statute declared its southern boundary to be twenty-seven marine miles from the shore line.[3]

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[1] The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

28 U. S. C. § 1872 provides: "In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."

[2] And see Dart, Louisiana Constitutions (1932), p. 499.

[3] 6 Dart, La. Gen. Stats. (1939) §§ 9311.1–9311.4.

We think *United States* v. *California,* 332 U. S. 19, controls this case and that there must be a decree for the complainant.

We lay aside such cases as *Toomer* v. *Witsell,* 334 U. S. 385, 393, where a State's regulation of coastal waters below the low-water mark collides with the interests of a person not acting on behalf of or under the authority of the United States. The question here is not the power of a State to use the marginal sea or to regulate its use in absence of a conflicting federal policy; it is the power of a State to deny the paramount authority which the United States seeks to assert over the area in question. We also put to one side *New Orleans* v. *United States,* 10 Pet. 662, holding that title to or dominion over certain lots and vacant land along the river in the city of New Orleans did not pass to the United States under the treaty of cession but remained in the city. Such cases, like those involving ownership of the land under the inland waters (see, for example, *Pollard's Lessee* v. *Hagan,* 3 How. 212), are irrelevant here. As we pointed out in *United States* v. *California,* the issue in this class of litigation does not turn on title or ownership in the conventional sense. California, like the thirteen original colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. 332 U. S. pp. 31–34. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

That is the rationale of *United States* v. *California.* It is fully elaborated in the opinion of the Court in that case and does not need repetition.

We have carefully considered the extended and able argument of Louisiana in all its aspects and have found no reason why Louisiana stands on a better footing than California so far as the three-mile belt is concerned. The national interest in that belt is as great off the shore line of Louisiana as it is off the shore line of California. And there are no material differences in the preadmission or postadmission history of Louisiana that make her case stronger than California's. Louisiana prior to admission had no stronger claim to ownership of the marginal sea than the original thirteen colonies or California had. Moreover, the national dominion in the three-mile belt has not been sacrificed or ceded away in either case. The United States, acting through its Attorney General, who has authority to assert claims of this character and to invoke our jurisdiction in a federal-state controversy (*United States* v. *California,* pp. 26–29), now claims its paramount rights in this domain.

There is one difference, however, between Louisiana's claim and California's. The latter claimed rights in the three-mile belt. Louisiana claims rights twenty-four miles seaward of the three-mile belt. We need note only briefly this difference. We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension *vis à vis* persons other than the United States or those acting on behalf of or pursuant to its authority. The matter of state boundaries has no bearing on the present problem. If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. So far as the issues presented here are

concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including oil.

Louisiana's motion for a jury trial is denied. We need not examine it beyond noting that this is an equity action for an injunction and accounting. The Seventh Amendment and the statute,[4] assuming they extend to cases under our original jurisdiction, are applicable only to actions at law. See *Shields* v. *Thomas,* 18 How. 253, 262; *Barton* v. *Barbour,* 104 U. S. 126, 133–134.

We hold that the United States is entitled to the relief prayed for. The parties, or either of them, may before September 15, 1950, submit the form of decree to carry this opinion into effect.

So ordered.

MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

[For opinion of MR. JUSTICE FRANKFURTER in this case and in No. 13, Original, *United States* v. *Texas,* see *post,* p. 723.]

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[4] See note 1, *supra.*

UNITED STATES v. TEXAS.

NO. 13, ORIGINAL.

Argued March 28, 1950.—Decided June 5, 1950.

1. In this suit, brought in this Court by the United States against the State of Texas under Art. III, § 2, Cl. 2 of the Constitution, *held:* The United States is entitled to a decree adjudging and declaring the paramount rights of the United States as against Texas in the area claimed by Texas which lies under the Gulf of Mexico beyond the low-water mark on the coast of Texas and outside the inland waters, enjoining Texas and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring Texas to account to the United States for all money derived by it from the area after June 23, 1947. Pp. 709–720.
2. Even if Texas had both *dominium* and *imperium* in and over this marginal belt when she existed as an independent Republic, any claim that she may have had to the marginal sea was relinquished to the United States when Texas ceased to be an independent Nation and was admitted to the Union "on an equal footing with the existing States" pursuant to the Joint Resolution of March 1, 1845, 5 Stat. 797. Pp. 715–720.

   (a) The "equal footing" clause was designed not to wipe out economic diversities among the several States but to create parity as respects political standing and sovereignty. P. 716.

   (b) The "equal footing" clause negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State. P. 717.

   (c) Although *dominium* and *imperium* are normally separable and separate, this is an instance where property interests are so subordinated to the rights of sovereignty as to follow sovereignty. P. 719.

   (d) If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities, thereby giving rise to paramount national rights in it. *United States* v. *California,* 332 U. S. 19. P. 719.

   (e) The "equal footing" clause prevents extension of the sovereignty of a State into the domain of political and sovereign power

of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty which would produce inequality among the States. Pp. 719–720.

3. That Texas in 1941 sought to extend its boundary to a line in the Gulf of Mexico 24 marine miles beyond the three-mile limit and asserted ownership of the bed within that area and in 1947 sought to extend the boundary to the outer edge of the continental shelf do not require a different result. *United States* v. *Louisiana, ante*, p. 699. P. 720.
4. The motions of Texas for an order to take depositions and for the appointment of a special master are denied, because there is no need to take evidence in this case. Pp. 715, 720.
5. In ruling on a motion by the United States for leave to file the complaint in this case, 337 U. S. 902, and on a motion by Texas to dismiss the complaint for want of original jurisdiction, 338 U. S. 806, this Court, in effect, held that it had original jurisdiction under Art. III, § 2, Cl. 2 of the Constitution, even though Texas had not consented to be sued. Pp. 709–710.

The case and the earlier proceedings herein are stated in the opinion at pp. 709–712. The conclusion that the United States is entitled to the relief prayed for is reported at p. 720.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Attorney General McGrath, Assistant Attorney General Vanech, Arnold Raum, Oscar H. Davis, Robert E. Mulroney, Robert M. Vaughan, Frederick W. Smith* and *George S. Swarth.*

Price Daniel, Attorney General of Texas, and *J. Chrys Dougherty,* Assistant Attorney General, argued the cause for the defendant. With them on the brief were *Jesse P. Luton, Jr., K. Bert Watson, Dow Heard, Walton S. Roberts, Claude C. McMillan, Fidencio M. Guerra,* and *Mary K. Wall,* Assistant Attorneys General, and *Roscoe Pound* and *Joseph Walter Bingham.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This suit, like its companion, *United States* v. *Louisiana, ante,* p. 699, decided this day, invokes our original jurisdiction under Art. III, § 2, Cl. 2 of the Constitution and puts into issue the conflicting claims of the parties to oil and other products under the bed of the ocean below low-water mark off the shores of Texas.

The complaint alleges that the United States was and is

> "the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Texas and outside of the inland waters, extending seaward to the outer edge of the continental shelf and bounded on the east and southwest, respectively, by the eastern boundary of the State of Texas and the boundary between the United States and Mexico."

The complaint is in other material respects identical with that filed against Louisiana. The prayer is for a decree adjudging and declaring the rights of the United States as against Texas in the above-described area, enjoining Texas and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring Texas to account to the United States for all money derived by it from the area subsequent to June 23, 1947.

Texas opposed the motion for leave to file the complaint on the grounds that the Attorney General was not authorized to bring the suit and that the suit, if brought, should be instituted in a District Court. And Texas, like Louisiana, moved to dismiss on the ground that since Texas had not consented to be sued, the Court

had no original jurisdiction of the suit. After argument, we granted the motion for leave to file the complaint. 337 U. S. 902. Texas then moved to dismiss the complaint on the ground that the suit did not come within the original jurisdiction of the Court. She also moved for a more definite statement or for a bill of particulars and for an extension of time to answer. The United States then moved for judgment. These various motions were denied and Texas was granted thirty days to file an answer. 338 U. S. 806.

Texas in her answer, as later amended, renews her objection that this case is not one of which the Court has original jurisdiction; denies that the United States is or ever has been the owner of the lands, minerals, etc., underlying the Gulf of Mexico within the disputed area; denies that the United States is or ever has been possessed of paramount rights in or full dominion over the lands, minerals, etc., underlying the Gulf of Mexico within said area except the paramount power to control, improve, and regulate navigation which under the Commerce Clause the United States has over lands beneath all navigable waters and except the same dominion and paramount power which the United States has over uplands within the United States, whether privately or state owned; denies that these or any other paramount powers or rights of the United States include ownership or the right to take or develop or authorize the taking or developing of oil or other minerals in the area in dispute without compensation to Texas; denies that any paramount powers or rights of the United States include the right to control or to prevent the taking or developing of these minerals by Texas or her lessees except when necessary in the exercise of the paramount federal powers, as recognized by Texas, and when duly authorized by appropriate action of the Congress; admits that she claims rights, title, and interests in said lands, minerals, etc., and says that her rights include ownership and the right

to take, use, lease, and develop these properties; admits that she has leased some of the lands in the area and received royalties from the lessees but denies that the United States is entitled to any of them; and denies that she has no title to or interest in any of the lands in the disputed area.

As an affirmative defense, Texas asserts that as an independent nation the Republic of Texas had open, adverse, and exclusive possession and exercised jurisdiction and control over the land, minerals, etc., underlying that part of the Gulf of Mexico within her boundaries established at three marine leagues from shore by her First Congress and acquiesced in by the United States and other major nations; that when Texas was annexed to the United States the claim and rights of Texas to this land, minerals, etc., were recognized and preserved in Texas; that Texas continued as a State to hold open, adverse and exclusive possession, jurisdiction and control of these lands, minerals, etc., without dispute, challenge or objection by the United States; that the United States has recognized and acquiesced in this claim and these rights; that Texas under the doctrine of prescription has established such title, ownership and sovereign rights in the area as preclude the granting of the relief prayed.

As a second affirmative defense, Texas alleges that there was an agreement between the United States and the Republic of Texas that upon annexation Texas would not cede to the United States but would retain all of the lands, minerals, etc., underlying that part of the Gulf of Mexico within the original boundaries of the Republic.

As a third affirmative defense, Texas asserts that the United States acknowledged and confirmed the three-league boundary of Texas in the Gulf of Mexico as declared, established, and maintained by the Republic of Texas and as retained by Texas under the annexation agreement.

Texas then moved for an order to take depositions of specified aged persons respecting the existence and extent of knowledge and use of subsoil minerals within the disputed area prior to and since the annexation of Texas, and the uses to which Texas has devoted parts of the area as bearing on her alleged prescriptive rights. Texas also moved for the appointment of a special master to take evidence and report to the Court.

The United States opposed these motions and in turn moved for judgment asserting that the defenses tendered by Texas were insufficient in law and that no issue of fact had been raised which could not be resolved by judicial notice. We set the case down for argument on that motion.

We are told that the considerations which give the Federal Government paramount rights in, and full dominion and power over, the marginal sea off the shores of California and Louisiana (see *United States* v. *California,* 332 U. S. 19; *United States* v. *Louisiana, supra*) should be equally controlling when we come to the marginal sea off the shores of Texas. It is argued that the national interests, national responsibilities, and national concerns which are the basis of the paramount rights of the National Government in one case would seem to be equally applicable in the other.

But there is a difference in this case which, Texas says, requires a different result. That difference is largely in the preadmission history of Texas.

The sum of the argument is that prior to annexation Texas had both *dominium* (ownership or proprietary rights) and *imperium* (governmental powers of regulation and control) as respects the lands, minerals and other products underlying the marginal sea. In the case of California we found that she, like the original thirteen colonies, never had *dominium* over that area. The first claim to the marginal sea was asserted by the National Government. We held that protection and control of it

were indeed a function of national external sovereignty. 332 U. S. 31–34. The status of Texas, it is said, is different: Texas, when she came into the Union, retained the *dominium* over the marginal sea which she had previously acquired and transferred to the National Government only her powers of sovereignty—her *imperium*—over the marginal sea.

This argument leads into several chapters of Texas history.

The Republic of Texas was proclaimed by a convention on March 2, 1836.[1] The United States[2] and other nations[3] formally recognized it. The Congress of Texas on December 19, 1836, passed an act defining the boundaries of the Republic.[4] The southern boundary was described as follows: "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande."[5] Texas was admitted to the Union in 1845 "on an equal footing with the original States in all respects whatever."[6] Texas claims that during the period from 1836 to 1845 she had brought this marginal belt into her territory and subjected it to her domestic law which recognized ownership in minerals under coastal waters. This the United States contests. Texas also claims that under international law, as it had evolved by the 1840's, the Republic of Texas as a sovereign nation became the owner of the bed and

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[1] 1 Laws, Rep. of Texas, p. 6.

[2] See the Resolution passed by the Senate March 1, 1837 (Cong. Globe, 24th Cong., 2d Sess., p. 270), the appropriation of a salary for a diplomatic agent to Texas (5 Stat. 170), and the confirmation of a charge d'affaires to the Republic in 1837. 5 Exec. Journ. 17.

[3] See 2 Gammel's Laws of Texas 655, 880, 886, 889, 905 for recognition by France, Great Britain, and The Netherlands.

[4] 1 Laws, Rep. of Texas, p. 133.

[5] The traditional three-mile maritime belt is one marine league or three marine miles in width. One marine league is 3.45 English statute miles.

[6] See Joint Resolution approved December 29, 1845, 9 Stat. 108.

sub-soil of the marginal sea *vis-à-vis* other nations. Texas claims that the Republic of Texas acquired during that period the same interest in its marginal sea as the United States acquired in the marginal sea off California when it purchased from Mexico in 1848 the territory from which California was later formed. This the United States contests.

The Joint Resolution annexing Texas[7] provided in part:

> "Said State, when admitted into the Union, after ceding to the United States, *all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence* belonging to said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic; and shall also retain *all the vacant and unappropriated lands lying within its limits,* to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States." (Italics added.)

The United States contends that the inclusion of fortifications, barracks, ports and harbors, navy and navy-yards, and docks in the cession clause of the Resolution demonstrates an intent to convey all interests of the Republic in the marginal sea, since most of these properties lie side by side with, and shade into, the marginal sea. It stresses the phrase in the Resolution "other property and means pertaining to the public defence." It

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[7] Joint Resolution approved March 1, 1845, 5 Stat. 797.

argues that possession by the United States in the lands underlying the marginal sea is a defense necessity. Texas maintains that the construction of the Resolution both by the United States and Texas has been restricted to properties which the Republic actually used at the time in the public defense.

The United States contends that the "vacant and unappropriated lands" which by the Resolution were retained by Texas do not include the marginal belt. It argues that the purpose of the clause, the circumstances of its inclusion, and the meaning of the words in Texas and federal usage give them a more restricted meaning. Texas replies that since the United States refused to assume the liabilities of the Republic, it was to have no claim to the assets of the Republic except the defense properties expressly ceded.

In the *California* case, neither party suggested the necessity for the introduction of evidence. 332 U. S. 24. But Texas makes an earnest plea to be heard on the facts as they bear on the circumstances of her history which, she says, sets her apart from the other States on this issue.

The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts. *United States* v. *Texas,* 162 U. S. 1; *Kansas* v. *Colorado,* 185 U. S. 125, 144, 145, 147; *Oklahoma* v. *Texas,* 253 U. S. 465, 471. If there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential.

We conclude, however, that no such hearing is required in this case. We are of the view that the "equal footing" clause of the Joint Resolution admitting Texas to the Union disposes of the present phase of the controversy.

The "equal footing" clause has long been held to refer to political rights and to sovereignty. See *Stearns* v. *Minnesota,* 179 U. S. 223, 245. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. See *Stearns* v. *Minnesota, supra,* pp. 243–245. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.

Yet the "equal footing" clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the Federal Government and the States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny to the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States but reserved them to themselves. See *Pollard's Lessee* v. *Hagan,* 3 How. 212, 228–229; *Mumford* v. *Wardwell,* 6 Wall. 423, 436; *Weber* v. *Harbor Comm'rs,* 18 Wall. 57, 65–66; *Knight* v. *U. S. Land Assn.,* 142 U. S. 161, 183; *Shively* v. *Bowlby,* 152 U. S. 1, 26; *United States* v. *Mission Rock Co.,* 189 U. S. 391, 404. The theory of these decisions was aptly summarized by Mr. Justice Stone speaking for the Court in *United States* v. *Oregon,* 295 U. S. 1, 14 as follows: [8]

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[8] The same idea was expressed somewhat differently by Mr. Justice Field in *Weber* v. *Harbor Comm'rs, supra,* pp. 65–66 as follows: "Although the title to the soil under the tidewaters of the bay was

> "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts* v. *New York,* 271 U. S. 65, 89. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce."

The "equal footing" clause, we hold, works the same way in the converse situation presented by this case. It negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State. Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims. When Texas came into the Union, she ceased

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acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government."

to be an independent nation. She then became a sister State on an "equal footing" with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.

We stated the reasons for this in *United States* v. *California, supra,* p. 35, as follows:

> "The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations. See *United States* v. *Belmont,* 301 U. S. 324, 331–332. The very oil about which the state and nation here contend might well become the subject of international dispute and settlement."

And so although *dominium* and *imperium* are normally separable and separate,[9] this is an instance where property interests are so subordinated to the rights of sovereignty as to follow sovereignty.

It is said that there is no necessity for it—that the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it. Yet, as pointed out in *United States* v. *California,* once low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it. Such is the rationale of the *California* decision, which we have applied to Louisiana's case. The same result must be reached here if "equal footing" with the various States is to be achieved. Unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States. Yet neither the original thirteen States (*United States* v. *California, supra,* pp. 31–32) nor California nor Louisiana enjoys such an advantage. The "equal footing" clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States

[9] See the statement of Mr. Justice Field (then Chief Justice of the Supreme Court of California) in *Moore* v. *Smaw,* 17 Cal. 199, 218–219.

have been excluded, just as it prevents a contraction of sovereignty (*Pollard's Lessee* v. *Hagan, supra*) which would produce inequality among the States. For equality of States means that they are not "less or greater, or different in dignity or power." See *Coyle* v. *Smith,* 221 U. S. 559, 566. There is no need to take evidence to establish that meaning of "equal footing."

Texas in 1941 sought to extend its boundary to a line in the Gulf of Mexico twenty-four marine miles beyond the three-mile limit and asserted ownership of the bed within that area.[10] And in 1947 she put the extended boundary to the outer edge of the continental shelf.[11] The irrelevancy of these acts to the issue before us has been adequately demonstrated in *United States* v. *Louisiana.* The other contentions of Texas need not be detailed. They have been foreclosed by *United States* v. *California* and *United States* v. *Louisiana.*

The motions of Texas for an order to take depositions and for the appointment of a Special Master are denied. The motion of the United States for judgment is granted. The parties, or either of them, may before September 15, 1950, submit the form of decree to carry this opinion into effect.

So ordered.

MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE REED, with whom MR. JUSTICE MINTON joins, dissenting.

This case brings before us the application of *United States* v. *California,* 332 U. S. 19, to Texas. Insofar as Louisiana is concerned, I see no difference between its situation and that passed upon in the *California* case.

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[10] Act of May 16, 1941, L. Texas, 47th Leg., p. 454.

[11] Act of May 23, 1947, L. Texas, 50th Leg., p. 451.

Texas, however, presents a variation which requires a different result.

The *California* case determines, p. 36, that since "paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt." Thus the Court held, p. 39, that the Federal Government has power over that belt, an incident of which is "full dominion over the resources of the soil under that water area, including oil." But that decision was based on the premise, pp. 32–34, that the three-mile belt had never belonged to California. The *California* case points out that it was the United States which had acquired this seacoast area for the Nation. Sovereignty over that area passed from Mexico to this country. The Court commented that similar belts along their shores were not owned by the original seacoast states. Since something akin to ownership of the similar area along the coasts of the original states was thought by the Court to have been obtained through an assertion of full dominion by the United States to this hitherto unclaimed portion of the earth's surface, it was decided that a similar right in the California area was obtained by the United States. The contrary is true in the case of Texas. The Court concedes that, prior to the Resolution of Annexation, the United States recognized Texas ownership of the three-league area claimed by Texas.[1]

The Court holds immaterial the fact of Texas' original ownership of this marginal sea area, because Texas was admitted on an "equal footing" with the other states by the Resolution of Annexation. 5 Stat. 797. The scope of

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[1] See the statement in the Court's opinion as to the chapters of Texas history.

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the "equal footing" doctrine, however, has been thought to embrace only political rights or those rights considered necessary attributes of state sovereignty. Thus this Court has held in a consistent line of decisions that, since the original states, as an incident of sovereignty, had ownership and dominion over lands under navigable waters within their jurisdiction, states subsequently admitted must be accorded equivalent ownership. *E. g., Pollard's Lessee* v. *Hagan,* 3 How. 212; *Martin* v. *Waddell,* 16 Pet. 367. But it was an articulated premise of the *California* decision that the thirteen original states neither had asserted ownership nor had held dominion over the three-mile zone as an incident of sovereignty.

"Equal footing" has heretofore brought to a state the ownership of river beds, but never before has that phrase been interpreted to take away from a newly admitted state property that it had theretofore owned. I see no constitutional requirement that this should be done and I think the Resolution of Annexation left the marginal sea area in Texas. The Resolution expressly consented that Texas should retain all "the vacant and unappropriated lands lying within its limits." An agreement of this kind is in accord with the holding of this Court that ordinarily lands may be the subject of compact between a state and the Nation. *Stearns* v. *Minnesota,* 179 U. S. 223, 245. The Court, however, does not decide whether or not "the vacant and unappropriated lands lying within its limits" (at the time of annexation) includes the land under the marginal sea. I think that it does include those lands. Cf. *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86, 110. At least we should permit evidence of its meaning.

Instead of deciding this question of cession, the Court relies upon the need for the United States to control the area seaward of low water because of its international responsibilities. It reasons that full dominion over the

resources follows this paramount responsibility, and it refers to the California discussion of the point. 332 U. S. at 35. But the argument based on international responsibilities prevailed in the *California* case because the marginal sea area was staked out by the United States. The argument cannot reasonably be extended to Texas without a holding that Texas ceded that area to the United States.

The necessity for the United States to defend the land and to handle international affairs is not enough to transfer property rights in the marginal sea from Texas to the United States. Federal sovereignty is paramount within national boundaries, but federal ownership depends on taking possession, as the *California* case holds; on consent, as in the case of places for federal use; or on purchase, as in the case of Alaska or the Territory of Louisiana. The needs of defense and foreign affairs alone cannot transfer ownership of an ocean bed from a state to the Federal Government any more than they could transfer iron ore under uplands from state to federal ownership. National responsibility is no greater in respect to the marginal sea than it is toward every other particle of American territory. In my view, Texas owned the marginal area by virtue of its original proprietorship; it has not been shown to my satisfaction that it lost it by the terms of the Resolution of Annexation.

I would deny the United States motion for judgment.

MR. JUSTICE FRANKFURTER.†

Time has not made the reasoning of *United States* v. *California,* 332 U. S. 19, more persuasive but the issue there decided is no longer open for me. It is relevant, however, to note that in rejecting California's claim of

†[REPORTER'S NOTE: This is also the opinion of MR. JUSTICE FRANKFURTER in No. 12, Original, *United States* v. *Louisiana, ante,* p. 699.]

ownership in the off-shore oil the Court carefully abstained from recognizing such claim of ownership by the United States. This was emphasized when the Court struck out the proprietary claim of the United States from the terms of the decree proposed by the United States in the *California* case.*

I must leave it to those who deem the reasoning of that decision right to define its scope and apply it, particularly to the historically very different situation of Texas. As is made clear in the opinion of MR. JUSTICE REED, the submerged lands now in controversy were part of the domain of Texas when she was on her own. The Court now decides that when Texas entered the Union she lost what she had and the United States acquired it. How that shift came to pass remains for me a puzzle.

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*The decree proposed by the United States read in part:

"1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights *of proprietorship* in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean . . . ."

The italicized words were omitted in the Court's decree. 332 U. S. 804, 805.

UNITED STATES v. GERLACH LIVE STOCK CO.

NO. 4. CERTIORARI TO THE COURT OF CLAIMS.*

Argued March 1, 1949.—Reargued March 29–30, 1950.—Decided June 5, 1950.

Respondents are owners of so-called "uncontrolled grass lands" along the San Joaquin River in California which depend for water upon seasonal inundations resulting from overflows of the River. The value of these lands will be impaired by the construction by the United States of the Friant Dam and its dependent irrigation system, as part of the Central Valley Project, a gigantic undertaking by the Federal Government to redistribute the principal fresh water resources of California. While the project will have some relatively insignificant effects on navigation, its principal economic effects pertain to values realized from storage and redistribution of water for power, irrigation, reclamation, flood control and other similar purposes. Claiming under California law riparian rights to the benefits from the annual inundations of their lands, respondents sued in the Court of Claims for compensation. The Government contended that the damage was noncompensable, on the ground that the entire project was authorized by Congress, under the commerce power, as a measure for the control of navigation. *Held:* Judgments of the Court of Claims in favor of respondents are affirmed. Pp. 727–756.

1. Even if it be assumed that Friant Dam bears some relation to control of navigation, nevertheless Congress elected to treat it as a reclamation project, to recognize any state-created rights and to take them under its power of eminent domain; and the provisions of the Reclamation Act, 43 U. S. C. §§ 371 *et seq.*, providing for reimbursement, are applicable to these claims. Pp. 731–742.

(a) In undertaking the Friant projects and implementing the work as carried forward by the Reclamation Bureau, Congress proceeded on the basis of full recognition of water rights having valid existence under state law. Pp. 734–736.

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*Together with No. 5, *United States* v. *Potter;* No. 6, *United States* v. *Erreca;* No. 7, *United States* v. *James J. Stevinson* (*a Corporation*); No. 8, *United States* v. *Stevinson;* and No. 9, *United States* v. *3–H Securities Co.*, also on certiorari to the same court.

(b) Notwithstanding its general declaration of purpose that the Central Valley Project as a whole is to improve navigation, Congress did not intend to invoke its navigation servitude as to each and every one of this group of coordinated projects and has not attempted to take, or authorized the taking, without compensation, of rights valid under state law. Pp. 736–739.

(c) The administrative practice with reference to this project supports the view that it is a reclamation project involving respect for existing water rights and compensation to owners thereof. Pp. 739–742.

2. Under California law, respondents had riparian rights to periodic inundations of their lands by seasonal overflows of the River; these rights are compensable under California law; and the awards of the Court of Claims correctly applied the law of California as made applicable to these claims by Congress. Pp. 742–755.

3. This Court declines to set aside the determination of the Court of Claims that the date from which interest is to be allowed is October 20, 1941, the date of the first substantial impoundment of water, even though it had not then prevented benefits from reaching the property. P. 755.

4. This Court accepts without review a finding by the Court of Claims construing reservations in deeds of certain of the claimants, a question governed by conveyancing and real property law peculiar to this one case, depending on local law, and not of general interest, and on which there is no manifest error in the finding of the Court of Claims. P. 755.

5. The Court of Claims adequately described the rights taken and for which it made an award. P. 756.

111 Ct. Cl. 1, 89, 76 F. Supp. 87, 99, affirmed.

The Court of Claims severally awarded compensation to respondents for the taking by the United States, through the construction of Friant Dam, of their riparian rights to annual inundations of their lands along the San Joaquin River in California. 111 Ct. Cl. 1, 89, 76 F. Supp. 87, 99. This Court granted certiorari. 335 U. S. 883. *Affirmed*, p. 756.

Ralph S. Boyd argued the cause for the United States. With him on the briefs were *Solicitor General Perlman*,

Assistant Attorney General Vanech and *Roger P. Marquis. Robert L. Stern* was also with them on the brief on the original argument and *Stanley M. Silverberg* was also with them on the brief on the reargument.

Edward F. Treadwell argued the cause for respondents. With him on the brief was *Reginald S. Laughlin. Samuel I. Jacobs* was also of counsel for Potter, respondent in No. 5.

By special leave of Court, *Warner W. Gardner* argued the cause for Gill et al., as *amici curiae,* urging affirmance. With him on the brief on the original argument was *Milton T. Farmer* and with him on the brief on the reargument was *A. E. Chandler.*

An *amici curiae* brief, urging affirmance, was filed on behalf of the States of California, by *Fred N. Howser,* Attorney General, *Arvin B. Shaw, Jr.,* Assistant Attorney General, *Gilbert F. Nelson,* Deputy Attorney General, and *Northcutt Ely;* Idaho, by *Robert E. Smylie,* Attorney General; Kansas, by *Edward F. Arn,* Attorney General; Nebraska, by *James H. Anderson,* Attorney General; Nevada, by *Alan Bible,* Attorney General; New Mexico, by *Joe L. Martinez,* Attorney General; North Dakota, by *Nels G. Johnson,* Attorney General; Oregon, by *George Neuner,* Attorney General; South Dakota, by *Sigurd Anderson,* Attorney General; and Washington, by *Smith Troy,* Attorney General.

Harry W. Horton, W. R. Bailey and *Arvin B. Shaw, Jr.* filed a brief for the Irrigation Districts Association of California, as *amicus curiae,* urging affirmance.

Mr. Justice Jackson delivered the opinion of the Court.

We are asked to relieve the United States from six awards by the Court of Claims as just compensation for deprivation of riparian rights along the San Joaquin River

in California caused by construction of Friant Dam, and its dependent irrigation system, as part of the Central Valley Project.

This is a gigantic undertaking to redistribute the principal fresh-water resources of California. Central Valley is a vast basin, stretching over 400 miles on its polar axis and a hundred in width, in the heart of California. Bounded by the Sierra Nevada on the east and by coastal ranges on the west, it consists actually of two separate river valleys which merge in a single pass to the sea at the Golden Gate. Its rich acres, counted in the millions, are deficient in rainfall and must remain generally arid and unfruitful unless artificially watered.

Water resources there are, if they can be captured and distributed over the land. From the highland barricade at the north the Sacramento River flows southerly, while from the Yosemite region at the southeast the San Joaquin River winds northeasterly until the two meet and consort in outlet to the sea through estuaries that connect with San Francisco Bay. These dominating rivers collect tribute from many mountain currents, carry their hoardings past parched plains and thriftlessly dissipate them in the Pacific tides. When it is sought to make these streams yield their wasting treasures to the lands they traverse, men are confronted with a paradox of nature; for the Sacramento, with almost twice the water, is accessible to the least land, whereas about three-fifths of the valley lies in the domain of the less affluent San Joaquin.

To harness these wasting waters, overcome this perversity of nature and make water available where it would be of greatest service, the State of California proposed to re-engineer its natural water distribution. This project was taken over by the United States in 1935 and has since been a federal enterprise. The plan, in broad outline, is to capture and store waters of both rivers and many of their tributaries in their highland basins, in some

cases taking advantage of the resulting head for generation of electric energy. Shasta Dam in the north will produce power for use throughout much of the State and will provide a great reservoir to equalize seasonal flows of the Sacramento. A more dramatic feature of the plan is the water storage and irrigation system at the other end of the valley. There the waters of the San Joaquin will be arrested at Friant, where they would take leave of the mountains, and will be diverted north and south through a system of canals and sold to irrigate more than a million acres of land, some as far as 160 miles away. A cost of refreshing this great expanse of semiarid land is that, except for occasional spills, only a dry river bed will cross the plain below the dam. Here, however, surplus waters from the north are utilized, for through a 150-mile canal Sacramento water is to be pumped to the cultivated lands formerly dependent on the San Joaquin.

Both rivers afford navigation—the Sacramento for a considerable distance inland, the San Joaquin practically only at tidewater levels. The plan will have navigation consequences, principally on the Sacramento; but the effects on navigation are economically insignificant as compared with the values realized from redistribution of water benefits.

Such a project inevitably unsettles many advantages long enjoyed in reliance upon the natural order, and it is with deprivation of such benefits that we are here concerned.

Claimants own land parcels riparian to the San Joaquin.[1] These are called "uncontrolled grass lands," to distinguish them from either crop lands or "controlled grass lands," both of which have long been irrigated through controlled systems supplied from the stream.

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[1] Claimants' rights are subject to certain prior appropriative and other rights which do not affect the issues before us.

Neither of these latter will be injured by the diversion, for they are to be provided with the replacement water from the Sacramento.

Uncontrolled grass lands involved in the claims are parts of a large riparian area which benefits from the natural seasonal overflow of the stream. Each year, with predictable regularity, the stream swells and submerges and saturates these low-lying lands. They are moistened and enriched by these inundations so that forage and pasturage thrive, as otherwise they can not. The high stage of the river, while fluctuating in height and variable in arrival, is not a flood in the sense of an abnormal and sudden deluge. The river rises and falls in rhythm with the cycle of seasons, expansion being normal for its time as curtailment is for others, and both are repeated with considerable constancy over the years. It should be noted, however, that claimants' benefit comes only from the very crest of this seasonal stage, which crest must be elevated and borne to their lands on the base of a full river, none of which can be utilized for irrigation above and little of it below them. Their claim of right is, in other words, to enjoy natural, seasonal fluctuation unhindered, which presupposes a peak flow largely unutilized.

The project puts an end to all this. Except at rare intervals, there will be no spill over Friant Dam, the bed of the San Joaquin along claimants' lands will be parched, and their grass lands will be barren. Unlike the supply utilized for nearby crop and "controlled" lands, the vanishing San Joaquin inundation cannot be replaced with Sacramento water. Claimants have been severally awarded compensation for this taking of their annual inundations, on the theory that, as part of the natural flow, its continuance is a right annexed to their riparian property. 111 Ct. Cl. 1, 89, 76 F. Supp. 87, 99. The principal issues are common to the six cases in which we granted certiorari. 335 U. S. 883.

I. Navigation or Reclamation Project?

The Solicitor General contends that this overall project, and each part of it, has been authorized by Congress, under the commerce power, as a measure for control of navigation. Claimants on the other hand urge that although improvement of navigation was one objective of the Central Valley undertaking as a whole, nevertheless construction of the Friant Dam and the consequent taking of San Joaquin water rights had no purpose or effect except for irrigation and reclamation. This, it is claimed, was not only the actual, but the avowed purpose of Congress. On these conflicting assumptions the parties predicate contrary conclusions as to the right to compensation.

In the Rivers and Harbors Act of August 26, 1937, § 2, 50 Stat. 844, 850, and again in the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200, Congress said that "the entire Central Valley project . . . is . . . declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof . . . ." The 1937 Act also provided that "the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control . . . ."

But it also is true, as pointed out by claimants, that in these Acts Congress expressly "reauthorized" [2] a project

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[2] "[T]he entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized . . . ." The latter reference is to a $6,900,000 appropriation primarily for "Friant Reservoir and irrigation facilities therefrom," as a reclamation project "reimbursable under the Reclamation Law." 49 Stat. 1597, 1622.

Development of the water resources of Central Valley was initiated by the State of California. Cal. Stat. (1933) 2643. Studies were

already initiated by President Roosevelt, who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, § 4, and provided that they "shall be reimbursable in accordance with the reclamation laws." [3] A finding of feasibility, as required by law,[4] was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of "the Central Valley development as a Federal reclamation project" was approved by the President on December 2, 1935.

When it "reauthorized" the Central Valley undertaking, Congress in the same Act provided that "the provisions

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made of the feasibility of federal participation, and although there was no accompanying appropriation, the first congressional authorization in connection with the project was contained in the Act of Aug. 30, 1935, 49 Stat. 1028, 1038. In this Act, on the representation of the Chief of Engineers that, as to the Friant Dam phase, "No benefits would accrue to navigation from this development," (House Doc. No. 191, 73d Cong., 2d Sess. 3; and see Comm. on Rivers and Harbors, H. R., Doc. No. 35) Congress limited its approval of federal participation to purely navigation works in the northern part of the valley, and authorized a federal expenditure of $12,000,000 in the construction of Kennett Dam on the Sacramento. When it "reauthorized" the entire project, Congress provided that, when appropriated, this $12,000,000 should be exempt from the reimbursement requirements of the reclamation law. Act of Aug. 26, 1937, § 2, 50 Stat. 844, 850.

[3] The reference is to the Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U. S. C. §§ 371 *et seq.*

[4] Act of June 25, 1910, § 4, 36 Stat. 835, 836, provides that no irrigation project contemplated under the Reclamation Act "shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States." To this was added the requirement that the Secretary "shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States." Act of Dec. 5, 1924, § 4 (B), 43 Stat. 672, 702.

of the reclamation law,[5] as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: . . . ."

The Central Valley basin development envisions, in one sense, an integrated undertaking, but also an aggregate of many subsidiary projects, each of which is of first magnitude. It consists of thirty-eight major dams and reservoirs bordering the valley floor and scores of smaller ones in headwaters. It contemplates twenty-eight hydropower generating stations. It includes hundreds of miles of main canals, thousands of miles of laterals and drains, electric transmission and feeder lines and substations, and a vast network of structures for the control and use of water on two million acres of land already irrigated, three million acres of land to be newly irrigated, 360,000 acres in the delta needing protection from intrusions of salt water, and for municipal and miscellaneous purposes including cities, towns, duck clubs and game refuges. These projects are not only widely separated geographically, many of them physically independent in operation, but they are authorized in separate acts from year to year and are to be constructed at different times over a considerable span of years. A formula has been approved by the President by which multiple purpose dams are the

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[5] See n. 3, *supra*.

responsibility of the Bureau of Reclamation, and dams and other works only for flood control are exclusively the responsibility of the Army Engineers.[6] The entire Friant and San Joaquin projects at all times have been administered by the Bureau of Reclamation.

We cannot disagree with claimants' contention that in undertaking these Friant projects and implementing the work as carried forward by the Reclamation Bureau, Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws.[7] *Cf. Nebraska* v. *Wyoming,* 295 U. S. 40, 43; *Power Co.* v. *Cement Co.,* 295 U. S. 142, 164; *Nebraska* v. *Wyoming,* 325 U. S. 589, 614; *Mason Co.* v. *Tax Comm'n,* 302 U. S. 186. In this respect, Congress' action parallels that in *Ford & Son* v. *Little Falls Fibre Co.,* 280 U. S. 369. The original plan called

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[6] Letter of President Truman to the Secretary of the Interior, dated August 15, 1949, S. Doc. No. 113, 81st Cong., 1st Sess.

[7] The Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U. S. C. §§ 371 *et seq.*, to which Congress adverted, applies only to the seventeen Western States. Section 8 provides:

"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: . . . ."

To the extent that it is applicable this clearly leaves it to the State to say what rights of an appropriator or riparian owner may subsist along with any federal right.

for purchase of water rights and included an estimate of their cost.[8] We are advised by the Government that at least throughout administration of California reclamation projects it has been the consistent practice of the Bureau of Reclamation to respect such property rights. Such has specifically been the Bureau's practice in connection with the Friant project, and this has been reported to Congress,[9] which has responded some nine times in the past

[8] "Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land . . . ." Feasibility Report, Secretary of the Interior Ickes to President Roosevelt, Nov. 26, 1935. Included in the Secretary's estimated costs of the project was an item of $8,000,000 for "rights of way, water rights and general expense." *Ibid.* In the Act of Aug. 26, 1937, the Secretary was authorized to acquire "by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: . . . ." 50 Stat. 844, 850.

[9] In administering the Central Valley Project, the Bureau of Reclamation submitted appropriation requests regularly from 1938 through 1949. On each occasion, excepting fiscal year 1945, Congress was advised that San Joaquin water rights were being purchased, and every appropriation request but three (fiscal years 1941, 1945, and 1946) included an item for such water rights. Hearings, Subcomm. of the House Comm. on Appropriations, Interior Dept., 75th Cong., 1st Sess. 281, 282 (except as noted, all following references are to hearings before this subcommittee), and see H. R. Rep. No. 786, 75th Cong., 1st Sess. 14; Hearings, 75th Cong., 3d Sess. 349, and see H. R. Rep. No. 1855, 75th Cong., 3d Sess. 14; Hearings, 76th Cong., 1st Sess. 421, 422, and see H. R. Rep. No. 161, 76th Cong., 1st Sess. 16; Hearings, 76th Cong., 3d Sess. 495, and see H. R. Rep. No. 1709, 76th Cong., 3d Sess. 14; Hearings, 77th Cong., 1st Sess. 741; Hearings, 77th Cong., 2d Sess. 434–439; Hearings, Pt. 1, 78th Cong., 1st Sess. 1174; Hearings, Pt. 1, 79th Cong., 1st Sess. 1200; Hearings, Pt. 2, 79th Cong., 2d Sess. 315–317; Hearings, Pt. 3, 80th Cong., 1st Sess. 749–752; Hearings, Pt. 3, 80th Cong., 2d Sess. 1214, 1279–1280, and see Hearings, Subcomm. of the Senate Comm. on Appropriations, Interior Dept., 80th Cong., 2d Sess. 921–924; 50 Stat. 564, 597; 52 Stat. 291, 324; 53 Stat. 685, 719; 55 Stat. 303, 336; 56 Stat. 506, 536; 57 Stat. 451, 476; 60 Stat. 348, 367; 61 Stat. 460, 475; 62 Stat. 1112, 1129.

twelve years to requests for appropriations to meet such expenses. We think this amounts, not to authorizations and declarations creating causes of action against the United States, but to awareness and approval of administrative construction. We think it clear that throughout the conception, enactment and subsequent administration of the plan, Congress has recognized the property status of water rights vested under California law.

It is not to be doubted that the totality of a plan so comprehensive has some legitimate relation to control of inland navigation or that particular components may be described without pretense as navigation and flood control projects. This made it appropriate that Congress should justify making this undertaking a national burden by general reference to its power over commerce and navigation.

The Government contends that the overall declaration of purpose is applicable to Friant Dam and related irrigation facilities as an integral part of "what Congress quite properly treated as a unit." Adverting to *United States* v. *Willow River Co.*, 324 U. S. 499; *United States* v. *Commodore Park*, 324 U. S. 386; *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, the Government relies on the rule that it does not have to compensate for destruction of riparian interests over which at the point of conflict it has a superior navigation easement the exercise of which occasions the damage. And irrespective of divisibility of the entire Central Valley undertaking, the Government contends that Friant Dam involves a measure of flood control, an end which is sensibly related to control of navigation. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508.

Claimants, on the other hand, urge that at least the Friant Dam project was wholly unrelated to navigation ends and could not be controlled by the general Congressional declaration of purpose. They point out that, al-

though definitions of navigation have been expanded, *United States* v. *Appalachian Power Co., supra,* in every instance in which this Court has denied compensation for deprivation of riparian rights it has specifically noted that the federal undertaking bore some positive relation to control of navigation. *United States* v. *Willow River Co., supra,* 510; *United States* v. *Commodore Park, supra,* 391; *United States* v. *Appalachian Power Co., supra,* 423; *United States* v. *Chandler-Dunbar Co., supra,* 62; and cases cited. And, referring to *International Paper Co.* v. *United States,* 282 U. S. 399; *United States* v. *River Rouge Co.,* 269 U. S. 411, and cases cited, they observe that this Court has never permitted the Government to pervert its navigation servitude into a right to destroy riparian interests without reimbursement where no navigation purpose existed.

Since we do not agree that Congress intended to invoke its navigation servitude as to each and every one of this group of coordinated projects, we do not reach the constitutional or other issues thus posed. Accordingly, we need not decide whether a general declaration of purpose is controlling where interference with navigation is neither the means, *South Carolina* v. *Georgia,* 93 U. S. 4, nor the consequence, *United States* v. *Commodore Park, supra,* of its advancement elsewhere. Similarly, we need not ponder whether, by virtue of a highly fictional navigation purpose, the Government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them. We have never held that or anything like it, and we need not here pass on any question of constitutional power; for we do not find that Congress has attempted to take or authorized the taking, without compensation, of any rights valid under state law.

On the contrary, Congress' general direction of purpose we think was intended to help meet any objection to its

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constitutional power to undertake this big bundle of big projects. The custom of invoking the navigation power in authorizing improvements appears to have had its origin when the power of the Central Government to make internal improvements was contested and in doubt. It was not until 1936 that this Court in *United States* v. *Butler,* 297 U. S. 1, declared for the first time, and without dissent on this point, that, in conferring power upon Congress to tax "to pay the Debts and provide for the common Defence and general Welfare of the United States," the Constitution delegates a power separate and distinct from those later enumerated, and one not restricted by them, and that Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. If any doubt of this power remained, it was laid to rest the following year in *Helvering* v. *Davis,* 301 U. S. 619, 640. Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation.[10] But in view of this background we think that reference to the navigation power was in justification of federal action on the whole, not for effect on private rights at every location along each component project.

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[10] See Feasibility Report, Secretary of the Interior Ickes to President Roosevelt, Nov. 26, 1935, recommending "the approval of the Central Valley development as a Federal reclamation project," and pointing out that the area is served by excellent transportation facilities, that much of its produce is shipped to eastern markets, and that if decreasing productivity as a result of acute shortage of water for irrigation needs were to continue, "a share of the loss will be suffered by persons not residing in the areas directly affected."

Even if we assume, with the Government, that Friant Dam in fact bears some relation to control of navigation, we think nevertheless that Congress realistically elected to treat it as a reclamation project. It was so conceived and authorized by the President and it was so represented to Congress. Whether Congress could have chosen to take claimants' rights by the exercise of its dominant navigation servitude is immaterial. By directing the Secretary to proceed under the Reclamation Act of 1902, Congress elected not "to in any way interfere with the laws of any State . . . relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 32 Stat. 388, 390.

We cannot twist these words into an election on the part of Congress under its navigation power to take such water rights without compensation. In the language of Mr. Justice Holmes, writing for the Court in *International Paper Co.* v. *United States,* 282 U. S. 399, 407, Congress "proceeded on the footing of a full recognition of [riparians'] rights and of the Government's duty to pay for the taking that [it] purported to accomplish." We conclude that, whether required to do so or not, Congress elected to recognize any state-created rights and to take them under its power of eminent domain.[11]

We are guided to this conclusion by the interpretation placed on Congress' Acts by the Reclamation Bureau, which, in administering the project, has at all times pursued a course impossible to reconcile with present contentions of the Government. From the be-

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[11] This approach makes it unnecessary to consider the relevancy of *United States* v. *Hotel Co.,* 329 U. S. 585; *United States* v. *Goltra,* 312 U. S. 203; *Tillson* v. *United States,* 100 U. S. 43, on the question of claimants' right to interest. Unless we choose to disturb these cases we could not limit ourselves to saying that by invocation of the Reclamation Act of 1902 Congress simply assumed liability for claimants' water rights.

ginning, it has acted on the assumption that its Friant undertaking was a reclamation project. Even a casual inspection of its committee hearings and reports leaves no doubt that Congress was familiar with and approved this interpretation. Although the Solicitor General contends that, because of the navigation purpose remotely involved, deprivation of water rights along the San Joaquin is not compensable, we have observed that the plan as originally adopted and as carried out by the Bureau included replacement at great expense of all water formerly used for crops and "controlled grass lands" and purchase of that used on marginal pasture lands.[12] It has consistently advised the Congress that it was purchasing San Joaquin water rights and appropriations have been made accordingly.[13] Moreover, Congress [14] and the water users [15] have been advised that, in prosecution of the work, existing water rights would be respected.

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[12] See n. 8, *supra.*

[13] See n. 9, *supra.*

[14] "In conducting irrigation investigations and constructing and operating projects throughout the West, the Bureau of Reclamation fully recognizes and respects existing water rights established under State law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure. This basin report on the Central Valley is predicated on such a policy." Report of Regional Director, Region II, Bureau of Reclamation, Dec. 1, 1947, approved by the Secretary of the Interior, July 29, 1948, S. Doc. No. 113, 81st Cong., 1st Sess. 39.

[15] After consultation with the Commissioner of Reclamation and the Secretary of the Interior, the Regional Director, Region II, Bureau of Reclamation, replied to questions concerning the Central Valley Project submitted by the Irrigation Districts Association of California:

"The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation pro-

This administrative practice has been extended even to the lands in question. Pursuant to its plan, the Bureau offered to purchase the rights of claimants in Nos. 7, 8 and 9, but the parties could not agree on the price. In addition, it entered into a written contract with Miller & Lux, Inc., purchasing for $2,450,000 riparian rights which included some identical with those the Government now denies to exist. In fact it includes the very rights now asserted by claimants Gerlach, Erreca and Potter, who obtained title to their riparian properties from Miller & Lux. Because of certain reservations in their grants, it was possible that Miller & Lux retained the rights riparian to these properties. The Government therefore agreed with Miller & Lux that the sum of $511,350 should be deposited with an escrow agent. If final judgments obligate the United States to make compensation to Miller & Lux grantees for such riparian grass lands, the United States shall be reimbursed from

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gram administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that requirement of Federal law; and on the contrary, the Bureau of Reclamation and the Secretary of the Interior have consistently, through the 42 years since the 1902 act, been zealous in maintaining compliance with Section 8 of the 1902 act. They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws. Ample demonstration of the effect of this law and policy of administration, in action, has been given in connection with the Central Valley Project. Water filings made by the State have been obtained by the Bureau of Reclamation by assignment, and vested water rights have been acquired by the United States by purchase, the considerations amounting to millions of dollars and being agreeable to the vendors—all in conformity with State laws. Further, other water rights of landowners which will or may be affected by the operations of the project are being analyzed and appropriate adjustments, giving full recognition of the rights of the landowners, are in the process of being worked out."

the escrow fund in an amount not exceeding $9 per acre. However, if final judgments dismiss the claims, the escrowed funds go to Miller & Lux. The substance of this strange transaction is that the Government, which now asks us to hold that there are no such riparian rights, has already bought and paid for them at the price which the Court of Claims has allowed. The results of the Government's bargain are that, if we hold there are no rights, Miller & Lux will be paid for them; and, if we hold there are such rights, they will be paid from what otherwise goes to Miller & Lux. As to these three cases, the Government is defending against the claims, not as the real party in interest, but because it undertook to do so on behalf of Miller & Lux.

Of course, this Court is not bound by administrative mistakes. If the Government had contracted to pay for rights which are nonexistent, it would not preclude us from upholding later and better advised contentions. But when a project has been regarded by the highest Executive authorities as a reclamation project, and has been carried as such from its initiation to final payment for these rights, and Congress, knowing its history, has given the approvals that it has, we think there is no ground for asking us to hold that the provisions of the Reclamation Act do not apply. We hold that they do apply and we therefore turn, as that Act bids us, to the laws of the State to determine the rights and liabilities of landowner and appropriator.

II. Claimants' Riparian Rights Under California Law.

The adversaries in this case invoke rival doctrines of water law which have been in competition throughout California legal history. The claims are expressly based on common-law riparian-rights doctrines as declared by California courts. The United States, on the other hand,

by virtue of the Reclamation Act, stands in the position of an upstream appropriator for a beneficial use.

The governing water law of California must now be derived from a 1928 Amendment to its Constitution [16] which compresses into a single paragraph a reconciliation and modification of doctrines evolved in litigations that have vexed its judiciary for a century. Its text leaves many questions to be answered, and neither it nor any legislation or judicial decision provides a direct and explicit determination of the present state law on issues before us. But since the federal law adopts that of the State as the test of federal liability, we must venture a conclusion as to peculiarly local law. We can do so only in the

[16] That amendment added Art. XIV, § 3 of the State Constitution, which provides:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

light of a long history of strife and doctrinal conflict, which California says must be known by every judge of these matters, *Conger* v. *Weaver,* 6 Cal. 548, and in continuity with which both the cryptic text of the Amendment and the policy of federal statutes become more intelligible.[17]

Upon acquiring statehood in 1850, California adopted the common law of England as the rule of decision in its courts when not inconsistent with the Federal or State Constitutions or State legislation. In the middle of the Eighteenth Century, English common law included a body of water doctrine known as riparian rights. That also was the general Mexican law, if it had any lingering authority there, but see *Boquillas Cattle Co.* v. *Curtis,* 213 U. S. 339, 343; *Gutierres* v. *Albuquerque Land Co.,* 188 U. S. 545, 556, except for a peculiar concession to "pueblos." Indeed, riparian-rights doctrines prevailed throughout Western civilization.

As long ago as the Institutes of Justinian, running waters, like the air and the sea, were *res communes*—things common to all and property of none. Such was the doctrine spread by civil-law commentators and embodied

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[17] The historical background of both riparian and appropriative rights, the relevant local history and the legislative history of the Act of 1866 are comprehensibly set forth in 1 Wiel, Water Rights in the Western States §§ 66 to 264 (3d ed., 1911), and in the following articles by the same author: *Public Policy in Water Decisions,* 1 Calif. L. Rev. 11; *Comparative Water Law,* 6 Calif. L. Rev. 245, 342; *Political Water Rights,* 10 Calif. L. Rev. 111; *Theories of Water Law,* 27 Harv. L. Rev. 530. See also Pomeroy on Water Rights, cc. 2, 3 (1893); 3 Farnham, Waters and Water Rights, c. 22; Toelle, *Prospective Effect on Western Water Law of Proposed Federal Missouri Valley and Columbia Valley Authorities,* 20 Temple L. Q. 425; Walton, *Origin and Growth of Western Irrigation Law,* 21 Ill. L. Rev. 126; Bannister, *Federal Disposition of Waters in the Priority States,* 28 Harv. L. Rev. 270; Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration,* 1 Rocky Mt. L. Rev. 161.

in the Napoleonic Code and in Spanish law. This conception passed into the common law. From these sources, but largely from civil-law sources, the inquisitive and powerful minds of Chancellor Kent and Mr. Justice Story drew in generating the basic doctrines of American water law.

Riparian rights developed where lands were amply watered by rainfall. The primary natural asset was land, and the run-off in streams or rivers was incidental. Since access to flowing waters was possible only over private lands, access became a right annexed to the shore. The law followed the principle of equality which requires that the corpus of flowing water become no one's property and that, aside from rather limited use for domestic and agricultural purposes by those above, each riparian owner has the right to have the water flow down to him in its natural volume and channels unimpaired in quality. The riparian system does not permit water to be reduced to possession so as to become property which may be carried away from the stream for commercial or nonriparian purposes. In working out details of this egalitarian concept, the several states made many variations, each seeking to provide incentives for development of its natural advantages. These are set forth in *Shively* v. *Bowlby*, 152 U. S. 1. But it may be said that when California adopted it the general philosophy of the riparian-rights system had become common law throughout what was then the United States.

Then in the mountains of California there developed a combination of circumstances unprecedented in the long and litigious history of running water. Its effects on water laws were also unprecedented. Almost at the time when Mexico ceded California, with other territories, to the United States, gold was discovered there and a rush of hardy, aggressive and venturesome pioneers began. If the high lands were to yield their treasure to

prospectors, water was essential to separate the precious from the dross. The miner's need was more than a convenience—it was a necessity; and necessity knows no law. But conditions were favorable for necessity to make law, and it did—law unlike any that had been known in any part of the Western world.

The adventurers were in a little-inhabited, unsurveyed, unowned and almost ungoverned country, theretofore thought to have little value. It had become public domain of the United States and miners regarded waters as well as lands subject to preemption. To be first in possession was to be best in title. Priority—of discovery, location and appropriation—was the primary source of rights. Fortuitously, along lower reaches of the streams there were no riparian owners to be injured and none to challenge customs of the miners.

In September, 1850, California was admitted to the Union as a State. In 1851, its first Legislature enacted a Civil Practice Act which contained a provision that "in actions respecting 'Mining Claims,' . . . customs, usages, or regulations, when not in conflict with the Constitution and Laws of this State, shall govern the decision of the action." [18] The custom of appropriating water thus acquired some authority, notwithstanding its contradiction of the common law. A practice that was law in the mountains was contrary to the law on the books. Here were provocations to controversy that soon came to the newly established state courts.

In California, as everywhere, the law of flowing streams has been the product of contentions between upper and lower levels. Thus when Matthew Irwin built a dam and canal on the upper San Joaquin for appropriating water to supply miners, downstream settler Robert Phillips tore

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[18] Civil Practice Act of April 29, 1851, § 621. In substance now § 748, Code Civil Procedure.

it down and asserted his own riparian right to have the water descend to him in its natural volume. Faced with this issue between custom and doctrine, the California Supreme Court escaped by observing that both claims were located on public domain, and that neither party could show proprietorship. Accordingly, as between two mere squatters, priority of appropriation established the better right. But the court gave warning that this appropriative right might not prevail against a downstream riparian who claimed by virtue of proprietorship. *Irwin* v. *Phillips,* 5 Cal. 140 (1855).

The United States, as owner of the whole public domain, was such a proprietor, and the decision made appropriations vulnerable to its challenge. It also left the pioneers in position of trespassers. They were taught that the tenure of their preemptions and appropriations was precarious when, in 1858, the Attorney General of the United States intervened in private litigation to contend in federal court that the land in dispute was public, and asserted generally a right to restrain all mining operations upon public land. His intervention was successful, an injunction forbade working the mine in question, and a writ issued under the hand of President Lincoln directing military authorities to remove the miners. *United States* v. *Parrott,* 1 McAll. (C. C.) 271.

Demands of mining and water interests that the Federal Government relieve their uncertain status were loud, but went unheeded amidst the problems that came with civil war. But after the war closed, the issue was again precipitated by a bill introduced at the request of the Secretary of the Treasury to have the United States withdraw all mines from the miners, appraise and sell them, reserving a royalty after sale. This the Secretary believed would yield a large revenue and the public lands would help pay the public war debt. However, the private interests prevailed. The Act of July 26, 1866, 14

Stat. 251, R. S. § 2339, declared the mining lands free and open to preemption and included the following:

> "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." 14 Stat. 251, 253, 43 U. S. C. § 661.

This section was expounded by Mr. Justice Field in *Jennison* v. *Kirk,* 98 U. S. 453, as foreclosing further proprietary objection by the United States to appropriations which rested upon local custom. This Court regarded the Act as "an unequivocal grant" for existing diversions of water on the public lands. *Broder* v. *Water Co.,* 101 U. S. 274. Thus Congress made good appropriations in being as against a later patent to riparian parcels of the public domain, and removed the cloud cast by adverse federal claims.

While this was being accomplished, changed conditions brought new adversaries to contend against the appropriators. The Homestead Act of 1862 had opened agricultural lands to preemption and set up a method of acquiring formal title. 12 Stat. 392. Farms and ranches appeared along the streams and wanted the protection that the common law would give to their natural flow.

The Act of 1866, as we have noted, made appropriators liable for damage to settlers with whose possession they interfered. The Supreme Court of California decided that a riparian owner came into certain rights which he could assert against a subsequent appropriator of the waters of the stream, even though he could not as against a prior appropriation. *Crandall* v. *Woods,* 8 Cal. 136.

In 1886 came the decisive battle of *Lux* v. *Haggin,* 69 Cal. 255, 10 P. 674. Haggin organized an irrigation company and claimed the right to appropriate the entire flow of the Kern River for irrigation and to destroy any benefits for riparian owners downstream. The court held that the doctrine of riparian rights still prevailed in California, that such right attached to riparian land as soon as it became private property and, while subject to appropriations made prior to that time, it is free from all hostile appropriations thereafter. Thus California set itself apart by its effort to reconcile the system of riparian rights with the system of appropriation, whereas other arid states rejected the doctrine of riparian rights forthrightly and completely.

The Twentieth Century inducted new parties into the old struggle. Gigantic electric power and irrigation projects succeeded smaller operations, and municipalities sought to by-pass intervening agricultural lands and go into the mountains to appropriate the streams for city supply. Increasing dependence of all branches of the State's economy, both rural and urban, upon water centered attention upon its conservation and maximum utilization.

This objective seemed frustrated by the riparian-rights doctrine when, in 1926, the California Supreme Court decided *Herminghaus* v. *Southern California Edison Co.,* 200 Cal. 81, 252 P. 607, and this Court, after argument, dismissed certiorari for want of a federal question, 275 U. S. 486 (1927). That case involved just such questions as we have here. Southern California Edison projected

a large storage of San Joaquin waters in the mountains primarily for power generation. Plaintiffs' ranch, like lands of claimants, had always been naturally irrigated by overflow and thus naturally was productive property. Appropriation by the power company threatened to impair this overflow and destroy the value of the ranch. The company was unwilling to compensate the damage. The court held that common law of riparian rights must prevail against the proposed utilization and, notwithstanding the economic waste involved in plaintiffs' benefit, enjoined the power project.

This ruling precipitated a movement for amendment of the State Constitution and thus brought to a focus a contest that had grown in bitterness and intensity throughout the arid regions as both populations and property values mounted. The doctrine of riparian rights was characterized as socialistic. Wiel, *Theories of Water Law,* 27 Harv. L. Rev. 530 (1914). The State Supreme Court said the law of appropriation would result in monopoly. *Lux* v. *Haggin, supra,* at 309, 10 P. at 703. If the uneconomic consequences of unlimited riparianism were revealed by court decisions, so the effects of unrestrained appropriation became apparent where the flow of rivers became completely appropriated, leaving no water for newcomers or new industry.[19]

A Joint Committee of the California Legislature gave extended study to the water problems of that State and careful consideration of many remedies. Among other

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[19] Court opinions indicate that all the waters of the South Platte River have been appropriated and the entire normal flow of the river is inadequate to supply the priorities for irrigation purposes already decreed from it. *Comstock* v. *Ramsey,* 55 Colo. 244, 133 P. 1107. The entire Boise River in Idaho has been appropriated. *United States* v. *Burley,* 172 F. 615. Many Colorado streams are already overappropriated. *Humphreys T. Co.* v. *Frank,* 46 Colo. 524, 105 P. 1093. See Wiel, *Theories of Water Law,* 27 Harv. L. Rev. 530.

proposals, one relevant to our question was to revoke or nullify all common-law protection to riparian rights and do it retroactively as of the year 1850.[20] The Committee rejected all dispossession proposals as confiscatory. It reported an amendment to the Constitution which attempted to serve the general welfare of the State by preserving and limiting both riparian and appropriative rights while curbing either from being exercised unreasonably or wastefully. The Amendment was submitted to and adopted by the electors in November 1928 and now constitutes California's basic water law, to which the Federal Reclamation Act defers.

We cannot assume that this Amendment was without impact upon claims to water rights such as we have here, for, as we have seen, it was provoked by their assertion. Neither can we assume that its effect is to deprive riparian owners of benefits it declares to continue or unintentionally to strike down values there was a studied purpose to preserve. We are only concerned with whether it continued in claimants such a right as to be compensable if taken. But what it took away is some measure of what it left.

Riparianism, pressed to the limits of its logic, enabled one to play dog-in-the-manger. The shore proprietor could enforce by injunction his bare technical right to have the natural flow of the stream, even if he was getting no substantial benefit from it. This canine element in the doctrine is abolished. "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, ..." This limitation is not trans-

[20] The legislative history of the Amendment is set forth in Wiel, *The Pending Water Amendment,* 16 Calif. L. Rev. 169 and 257, and see Wiel, *Europeanizing the State Constitution—The Water and Power Amendment,* 12 Calif. L. Rev. 454; Note, 1 Stanford L. Rev. 172.

gressed by the awards in question which only compensate for the loss of actual beneficial use. Any hazard to claimants' rights lurks in the following clause: "and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." Since riparian rights attach to, and only to, so much of the flow of the San Joaquin as may be put to beneficial use consistently with this clause, claimants can enforce no use of wasteful or unreasonable character.

We assume for purposes of this decision that the prodigal use, inseparable from claimants' benefits, is such that the rights here asserted might not be enforced by injunction. But withholding equitable remedies, such as specific performance, mandatory orders or injunctions, does not mean that no right exists. There may still be a right invasion of which would call for indemnification. In fact, adequacy of the latter remedy is usually grounds for denial of the former.

But the public welfare, which requires claimants to sacrifice their benefits to broader ones from a higher utilization, does not necessarily require that their loss be uncompensated any more than in other takings where private rights are surrendered in the public interest. The waters of which claimants are deprived are taken for resale largely to other private land owners not riparian to the river and to some located in a different water shed. Thereby private lands will be made more fruitful, more valuable, and their operation more profitable. The reclamation laws contemplate that those who share these advantages shall, through water charges, reimburse the Government for its outlay. This project anticipates recoupment of its cost over a forty-year period.[21] No rea-

[21] The Feasibility Report of Secretary Ickes, *supra*, n. 8, referring to Friant Dam, Friant-Kern Canal and Madera Canal, among others included, says, "The next declaration required is that the cost of

son appears why those who get the waters should be spared from making whole those from whom they are taken. Public interest requires appropriation; it does not require expropriation. We must conclude that by the Amendment California unintentionally destroyed and confiscated a recognized and adjudicated private property right, or that it remains compensable although no longer enforcible by injunction. The right of claimants at least to compensation prior to the Amendment was entirely clear. Insofar as any California court has passed on the exact question, the right appears to survive.[22] Five years after the Amendment, the Superior Court of California [23] specifically sustained identical rights. The Madera Irrigation District had been organized to build a dam at the Friant site and to divert San Joaquin waters to irrigate about 170,000 acres. It was sued by Miller & Lux, Inc., and two of its subsidiaries, and decrees in their favor were entered in 1933. In general, the court sustained the Miller & Lux riparian rights to the annual overflow of uncontrolled grass lands, some of which now belong to

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construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from the project works. The estimated cost of construction is $170,000,000 and the annual cost, including repayment of all other charges is $7,500,000. It is estimated that annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost."

[22] United States District Court, Southern District of California, rendered a decision on April 12, 1950, in *Rank* v. *Krug*, 90 F. Supp. 773, consistent with the views we take of the issues here involved.

[23] *Sacramento & San Joaquin Drainage District Co.* v. *Superior Court*, 196 Cal. 414, 432, 238 P. 687, 694. This is not a local court but a part of a system of state courts. It seems to fall within the rule of *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, as a court whose decrees are regarded as determination of state law rather than within the rule of *King* v. *Order of Travelers*, 333 U. S. 153.

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claimants. It adjudged the proposed appropriation invalid and ineffective as against those rights. In July of 1940 the United States acquired all of Madera's rights, including pending applications to appropriate San Joaquin water under state law. These judgments had become final and were outstanding adjudications of the issues here involved against a grantor of the United States. Without considering the claim that the 1933 judgments may be *res judicata,* they are at least persuasive that claimants' rights to the benefit had, in the opinion of California courts, survived the Amendment and must be retired by condemnation or acquisition before the Friant diversion could be valid.

The Supreme Court of California has given no answer to this specific problem. But in the light of its precedents and its conclusions and discussions of collateral issues, especially in *Peabody* v. *Vallejo,* 2 Cal. 2d 351, 40 P. 2d 486; *Lodi* v. *East Bay Municipal Utility District,* 7 Cal. 2d 316, 60 P. 2d 439; *Hillside Water Co.* v. *Los Angeles,* 10 Cal. 2d 677, 76 P. 2d 681; *Gin S. Chow* v. *Santa Barbara,* 217 Cal. 673, 22 P. 2d 5; *Meridian, Ltd.* v. *San Francisco,* 13 Cal. 2d 424, 90 P. 2d 537; *Los Angeles* v. *Glendale,* 23 Cal. 2d 68, 142 P. 2d 289, we conclude that claimants' right to compensation has a sound basis in California law. The reclamation authorities were apparently of that view as the Miller & Lux contract would indicate.

We recognize that the right to inundation asserted here is unique in the history of riparian claims. Where the thirst of the land is supplied by rainfall, floods are detriments if not disasters, and to abate overflows could rarely if ever cause damage. But, as we have pointed out, uncommon local conditions have given rise to the singular rule of California. The same scarcity which makes it advantageous to take these waters gives them value in the extraordinary circumstances in which the California

courts have recognized a private right to have no interception of their flow except upon compensation.

We think the awards of the Court of Claims correctly applied the law of California as made applicable to these claims by Congress.

III. Other Issues.

The Government also assigns as error determination of the date from which interest is to be allowed. The Court of Claims adopted as the date of taking the first substantial impoundment of water which occurred on October 20, 1941, even though it had not then prevented benefits from reaching the property. The contract between the Government and Miller & Lux contemplated this as the date of taking, for it puts the $511,350 in escrow to protect the Government against suits "initiated prior to the sixth anniversary after the initial storage or diversion." Since the Government itself has adopted this date for the expiration of its protection by contract, we see no reason why it should challenge the Court of Claims for use of the same date for accrual of the claims. Regardless of how this might have been fixed in the absence of such an administrative determination, we decline to set aside the finding on this subject.

Second, the Government claims that the court below misconstrued reservations in the deeds between the three claimants and Miller & Lux. It is not apparent from the facts we have recited that the Government is the real party in interest as to this question, which seems to be in the nature of a private controversy between claimants and Miller & Lux. In any event, it presents a question of conveyancing and real property law peculiar to this one case, and depending on local law. It is not a question of general interest, nor is there any manifest error, and we accept, without review, the finding of the Court of Claims thereon.

Finally, the Government protests that the court below failed adequately to describe the rights taken for which it has made an award. We think in view of the simple nature of the claims, the exhaustive character of the findings and the understanding the Government must have acquired in seven years of the litigations, there is little prospect that it will be grievously misled by deficiencies, if any, that may exist in the description.

The judgments are

Affirmed.

Mr. Justice Black concurs in the judgment and opinion except that he agrees with Mr. Justice Douglas that interest should not be allowed.

Mr. Justice Douglas, concurring in part and dissenting in part.

I think it is clear under our decisions that respondents are not entitled to compensation as a matter of constitutional right. For we have repeatedly held that there are no private property rights in the waters of a navigable river. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424; *United States* v. *Commodore Park*, 324 U. S. 386, 390–391; *United States* v. *Willow River Co.*, 324 U. S. 499, 510. That is true whether the rights of riparian owners or the rights of appropriators are involved. See *Gibson* v. *United States*, 166 U. S. 269; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690. As the *Appalachian Power* case makes plain (311 U. S. 424, 427), the existence of property rights in the waters of a navigable stream are not dependent upon whether the United States is changing the flow of the river in aid of navigation or for some other purpose.

Nor can respondents' rights to recover be founded on the Acts which appropriated money for the Central Valley project. They created no independent right in any

claimant against the United States. That is the teaching of Justice Brandeis' opinion for the Court in *Mitchell* v. *United States,* 267 U. S. 341, 345–46. The appropriation in that case was for, *inter alia,* "losses to persons, firms, and corporations, resulting from the procurement of the land." In denying a claim for the loss of a business resulting from a taking of land, the Court said:

> "By including in the appropriation clause the words 'losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose,' Congress doubtless authorized the Secretary of War to take into consideration losses due to the destruction of the business, where he purchased land upon agreement with the owners. But it does not follow that, in the absence of an agreement, the plaintiffs can compel payment for such losses. To recover, they must show some statutory right conferred."

The same is true in this case. For example, § 2 of the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850, provided that the Secretary of the Interior "may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes." Authority to pay for water rights is, of course, not to be construed to mean an assumption of liability to pay.

Congress, to be sure, has full power to relinquish its immunity from suit for the taking. See *Ford & Son* v. *Little Falls Co.,* 280 U. S. 369, 377; *United States* v. *Realty Co.,* 163 U. S. 427, 440. And I think it has done so—not by the Acts appropriating funds for the project but by the Reclamation Act of 1902. 32 Stat. 388, 43 U. S. C. § 371 *et seq.*

The Act applies solely to the 17 western States. It deals with reclamation projects, as its title indicates. The Central Valley project is such a project.

Section 7 of the Act authorizes the Secretary of the Interior to purchase any rights necessary to the carrying out of the Act.[1] Section 8 provides:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Section 8 thus respects "any vested right" acquired under state water laws relating to irrigation, in "any interstate stream or the waters thereof." When such rights will be destroyed or interfered with by a proposed reclamation project, authority is found to acquire them under § 7. The customary method of acquiring the water rights is to file a notice of appropriation pursuant to state law.

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[1] Section 7 provides: "That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

Petitioner seeks to avoid the force of these Sections by asserting that they are not applicable to lands riparian to navigable streams.

The legislative history of the Act is not particularly instructive. The House Committee reporting the bill said that "Section 8 recognizes State control over waters of nonnavigable streams such as are used in irrigation." H. R. Rep. No. 1468, 57th Cong., 1st Sess., p. 6. There is no other evidence, however, that the framers thought the scope of the bill so narrow. When the Act was recommended in 1901, President Theodore Roosevelt was careful to suggest that there should be protection for "vested rights" and respect for state laws. 35 Cong. Rec. 6677, 6775–6776. There are statements to the same effect by Representative Mondell, who was in charge of the Bill in the House (35 Cong. Rec. 6678–6679) and by Senator Clark of Wyoming (35 Cong. Rec. 2222). The clause in § 8 according protection to "any vested right acquired" under state laws was added to the Bill by Committee amendment on the floor of the House. 35 Cong. Rec. 6762.

Whether § 8 authorizes payment for water rights riparian to navigable waters has not been authoritatively determined by the courts.[2] This Court has recognized, however, that administration of the Act is to be in conformity to state laws. See *Power Co.* v. *Cement Co.*, 295 U. S. 142, 164. *Nebraska* v. *Wyoming*, 325 U. S. 589, 614. That was the assumption in *Mason Co.* v. *Tax Commission*, 302 U. S. 186, a case involving the navigable waters of the Columbia River.

Whatever doubts there may be are for me dispelled by the administrative practice under the Act, as sum-

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[2] A United States District Court for the Southern District of California has recently held, however, that § 8 of the Act provides for the purchase of water rights taken in connection with the Central Valley Project. *Rank* v. *Krug*, 90 F. Supp. 773 (April 12, 1950).

marized by the Commissioner of Reclamation in a memorandum dated April 19, 1950. Reports from the seven regional counsel and a review of the files in the Bureau of Reclamation formed the basis for the memorandum.

The Commissioner concluded that it has been the almost invariable practice of the Bureau to file notices of appropriations under state law without regard to whether the stream involved was navigable or nonnavigable.[3] Such filings were made pursuant to state law

[3] The memorandum records the following data: Region 1 (Washington, Idaho, northern Oregon, western Montana) reported the filing of appropriations under state law in 12 projects involving navigable rivers. In Region 2 (northern California, Oregon), § 8 has been construed to include rights in navigable as well as nonnavigable waters, although the exact number of filings was not revealed. Although some filings for appropriation under state law have been made in Region 3 (southern California, Arizona, southern Nevada), the lower Colorado River projects are the single exception to the otherwise consistent administrative practice. In Region 4 (northern Nevada, Utah, western Wyoming, western Colorado), water rights on at least two navigable rivers have been acquired pursuant to state law. No occasion has yet arisen in Region 5 (Texas, New Mexico, Oklahoma, southern Colorado) making necessary the acquisition of water rights on navigable streams. In the only instance in Region 6 (eastern Montana, northern Wyoming, North and South Dakota) where a federal project interfered with private water rights on a navigable river, the rights were paid for by the United States. Water rights on three apparently navigable rivers in Region 7 (eastern Colorado, southern Wyoming, Nebraska, Kansas) were acquired by the United States in accordance with state laws.

The Commissioner notes that there are special circumstances concerning the lower Colorado River projects which explain the single exception. The Act authorizing Hoover Dam required that it be used first for "river regulation, improvement of navigation, and flood control," and only thereafter for irrigation. 45 Stat. 1061. Moreover, the Colorado River Compact assures an adequate supply of water for the project. The Commissioner points out that while no rights have been acquired on the lower Colorado under § 7, "a search of Bureau records fails to disclose any instance on that river in which the Bureau in connection with any of its projects failed or refused to

on water rights riparian to at least 13 navigable or probably navigable rivers. This administrative practice is too clear to be contradicted by the Bureau of Reclamation documents cited by petitioner.[4] Moreover, the Commissioner of Reclamation has drawn our attention to recent public statements by Department of Interior officers confirming this practice.

This Court has often emphasized that weight is to be given to the interpretation of a statute made by the administering agency. See *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 130. This long course of practice by the Bureau of Reclamation resolves any doubts and ambiguities that arise from the history and wording of the statute.

I conclude that Congress by § 8 of the Reclamation Act agreed to pay (though not required to do so by the Constitution) for water rights acquired under state law in navigable as well as nonnavigable streams. As the Court holds, respondents under California law have a

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recognize or make compensation for water rights validly established under State law."

Another possible exception is the decision of the Department of Interior not to purchase a power right on the Spokane River on the ground, among others, that the right affected navigable waters. Yet, in the past, the Bureau instituted appropriations on that river also.

[4] The unpublished Manual of the Bureau of Reclamation, printed for the guidance of its employees, supports petitioner's position in its 1913, 1917, and 1927 editions, and to a lesser extent in its 1938 edition. A new manual is now in preparation. These statements may have been based on an early decision of the Secretary of the Interior (*California Development Co.*, 33 L. D. 391), which also provides some support for the petitioner's position. The Commissioner of Reclamation, however, has explained that "despite the statement in earlier *Manuals* based upon the *California Land Development* opinion . . .," the Bureau's practice has been to make no distinction between navigable and nonnavigable waters.

water right. Section 8 therefore recognizes it as the basis for payment in connection with this federal project.

I do not think the claimants are entitled to interest. When the Government assumes a liability by statute, interest is not allowable unless specific provision is made for it. *United States* v. *Goltra,* 312 U. S. 203, 207; *United States* v. *Hotel Co.,* 329 U. S. 585, 588. A different rule obtains when the United States takes property protected by the Fifth Amendment. *Seaboard Air Line R. Co.* v. *United States,* 261 U. S. 299, 306. The present water rights, though not protected by the Fifth Amendment, are ones which the United States has agreed to pay for under §§ 7 and 8 of the Reclamation Act. Sections 7 and 8 contain no provision for the payment of interest. The Act refers to state law to determine whether a water right exists, not to ascertain the measure of damages for the taking.

JOHNSON, SECRETARY OF DEFENSE, ET AL. *v.* EISENTRAGER, ALIAS EHRHARDT, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 306. Argued April 17, 1950.—Decided June 5, 1950.

Respondents, who are nonresident enemy aliens, were captured in China by the United States Army and tried and convicted in China by an American military commission for violations of the laws of war committed in China prior to their capture. They were transported to the American-occupied part of Germany and imprisoned there in the custody of the Army. At no time were they within the territorial jurisdiction of any American civil court. Claiming that their trial, conviction and imprisonment violated Articles I and III, the Fifth Amendment, and other provisions of our Constitution, laws of the United States and provisions of the Geneva Convention, they petitioned the District Court for the District of Columbia for a writ of habeas corpus directed to the Secretary of Defense, the Secretary of the Army, and several officers of the Army having directive power over their custodian. *Held:*

1. A nonresident enemy alien has no access to our courts in wartime. Pp. 768–777.

(a) Our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments. P. 769.

(b) In extending certain constitutional protections to resident aliens, this Court has been careful to point out that it was the aliens' presence within its territorial jurisdiction that gave the Judiciary power to act. P. 771.

(c) Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to wartime security. P. 774.

(d) A resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from executive custody only to ascertain the existence of a state of war and

whether he is an alien enemy. Once these jurisdictional facts have been determined, courts will not inquire into any other issue as to his internment. P. 775.

(e) A nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts. P. 776.

2. These nonresident enemy aliens, captured and imprisoned abroad, have no right to a writ of habeas corpus in a court of the United States. *Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1, distinguished. Pp. 777–781.

3. The Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States. Pp. 781–785.

(a) The term "any person" in the Fifth Amendment does not extend its protection to alien enemies everywhere in the world engaged in hostilities against us. Pp. 782–783.

(b) The claim asserted by respondents and sustained by the court below would, in practical effect, amount to a right not to be tried at all for an offense against our armed forces. P. 782.

4. The petition in this case alleges no fact showing lack of jurisdiction in the military authorities to accuse, try and condemn these prisoners or that they acted in excess of their lawful powers. Pp. 785–790.

(a) The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established. P. 786.

(b) It being within the jurisdiction of a military commission to try these prisoners, it was for it to determine whether the laws of war applied and whether they had been violated. Pp. 786–788.

(c) It is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, wisdom or propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. P. 789.

(d) Nothing in the Geneva Convention makes these prisoners immune from prosecution or punishment for war crimes. P. 789.

(e) Article 60 of the Geneva Convention, requiring that notice of trial of prisoners of war be given to the protecting power, is inapplicable to trials for war crimes committed before capture. Pp. 789–790.

(f) Article 63 of the Geneva Convention, requiring trial of prisoners of war "by the same courts and according to the same

procedure as in the case of persons belonging to the armed forces of the detaining Power," is likewise inapplicable to trials for war crimes committed before capture. P. 790.

5. Since there is no basis in this case for invoking federal judicial power, it is not necessary to decide where, if the case were otherwise, the petition should be filed. Pp. 790–791.

84 U. S. App. D. C. 396, 174 F. 2d 961, reversed.

The District Court dismissed a petition for a writ of habeas corpus to inquire into the confinement of respondents by the United States Army in occupied Germany. The Court of Appeals reversed. 84 U. S. App. D. C. 396, 174 F. 2d 961. This Court granted certiorari. 338 U. S. 877. *Reversed,* p. 791.

Solicitor General Perlman argued the cause for petitioners. With him on the brief were *Assistant Attorney General McInerney, Oscar H. Davis, Robert S. Erdahl* and *Philip R. Monahan.*

A. Frank Reel and *Milton Sandberg* argued the cause for respondents. With them on the brief were *Wallace M. Cohen* and *Richard F. Wolfson.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

The ultimate question in this case is one of jurisdiction of civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas. The issues come here in this way:

Twenty-one German nationals petitioned the District Court of the District of Columbia for writs of *habeas corpus.* They alleged that, prior to May 8, 1945, they were in the service of German armed forces in China. They amended to allege that their employment there was by civilian agencies of the German Government. Their exact affiliation is disputed, and, for our purposes, immaterial. On May 8, 1945, the German High Command

executed an act of unconditional surrender, expressly obligating all forces under German control at once to cease active hostilities. These prisoners have been convicted of violating laws of war, by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan. Their hostile operations consisted principally of collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces. They, with six others who were acquitted, were taken into custody by the United States Army after the Japanese surrender and were tried and convicted by a Military Commission constituted by our Commanding General at Nanking by delegation from the Commanding General, United States Forces, China Theatre, pursuant to authority specifically granted by the Joint Chiefs of Staff of the United States. The Commission sat in China, with express consent of the Chinese Government. The proceeding was conducted wholly under American auspices and involved no international participation. After conviction, the sentences were duly reviewed and, with immaterial modification, approved by military reviewing authority.

The prisoners were repatriated to Germany to serve their sentences. Their immediate custodian is Commandant of Landsberg Prison, an American Army officer under the Commanding General, Third United States Army, and the Commanding General, European Command. He could not be reached by process from the District Court. Respondents named in the petition are Secretary of Defense, Secretary of the Army, Chief of Staff of the Army, and the Joint Chiefs of Staff of the United States.

The petition alleges, and respondents denied, that the jailer is subject to their direction. The Court of Appeals assumed, and we do likewise, that, while prisoners are

in immediate physical custody of an officer or officers not parties to the proceeding, respondents named in the petition have lawful authority to effect their release.

The petition prays an order that the prisoners be produced before the District Court, that it may inquire into their confinement and order them discharged from such offenses and confinement. It is claimed that their trial, conviction and imprisonment violate Articles I and III of the Constitution, and the Fifth Amendment thereto, and other provisions of the Constitution and laws of the United States and provisions of the Geneva Convention governing treatment of prisoners of war.

A rule to show cause issued, to which the United States made return. Thereupon the petition was dismissed on authority of *Ahrens* v. *Clark,* 335 U. S. 188.

The Court of Appeals reversed and, reinstating the petition, remanded for further proceedings. 84 U. S. App. D. C. 396, 174 F. 2d 961. It concluded that any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal; that, although no statutory jurisdiction of such cases is given, courts must be held to possess it as part of the judicial power of the United States; that where deprivation of liberty by an official act occurs outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over officials who have directive power over the immediate jailer.

The obvious importance of these holdings to both judicial administration and military operations impelled us to grant certiorari. 338 U. S. 877. The case is before us only on issues of law. The writ of *habeas corpus* must be granted "unless it appears from the application" that the applicants are not entitled to it. 28 U. S. C. § 2243.

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes. Absence of support from legislative or juridical sources is implicit in the statement of the court below that "The answers stem directly from fundamentals. They cannot be found by casual reference to statutes or cases." The breadth of the court's premises and solution requires us to consider questions basic to alien enemy and kindred litigation which for some years have been beating upon our doors.[1]

I.

Modern American law has come a long way since the time when outbreak of war made every enemy national

[1] From January 1948 to today, motions for leave to file petitions for *habeas corpus* in this Court, and applications treated by the Court as such, on behalf of over 200 German enemy aliens confined by American military authorities abroad were filed and denied. *Brandt* v. *United States,* and 13 companion cases, 333 U. S. 836; *In re Eichel* (one petition on behalf of three persons), 333 U. S. 865; *Everett* v. *Truman* (one petition on behalf of 74 persons), 334 U. S. 824; *In re Krautwurst,* and 11 companion cases, 334 U. S. 826; *In re Ehlen "et al.,"* and *In re Girke "et al.,"* 334 U. S. 836; *In re Gronwald "et al.,"* 334 U. S. 857; *In re Stattmann,* and 3 companion cases, 335 U. S. 805; *In re Vetter,* and 6 companion cases, 335 U. S. 841; *In re Eckstein,* 335 U. S. 851; *In re Heim,* 335 U. S. 856; *In re Dammann,* and 4 companion cases, 336 U. S. 922–923; *In re Muhlbauer,* and 57 companion cases, covering at least 80 persons, 336 U. S. 964; *In re Felsch,* 337 U. S. 953; *In re Buerger,* 338 U. S. 884; *In re Hans,* 339 U. S. 976; *In re Schmidt,* 339 U. S. 976; *Lammers* v. *United States,* 339 U. S. 976. And see also *Milch* v. *United States,* 332 U. S. 789.

These cases and the variety of questions they raised are analyzed and discussed by Fairman, Some New Problems of the Constitution Following the Flag, 1 Stanford L. Rev. 587.

an outlaw, subject to both public and private slaughter, cruelty and plunder. But even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance,[2] nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.

With the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens. Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection. If a person's claim to United States citizenship is denied by any official, Congress has directed our courts to entertain his action to declare him to be a citizen "regardless of whether he is within the United States or abroad." 54 Stat. 1171, 8 U. S. C. § 903. This Court long ago extended *habeas corpus* to one seeking admission to the country to assure fair hearing of his claims to citizenship, *Chin Yow* v.

[2] ". . . In the primary meaning of the words, an alien friend is the subject of a foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States (1 Kent Comm., p. 55; 2 Halleck Int. L. [Rev. 1908], p. 1; Hall Int. Law [7th ed.], p. 403, § 126; Baty & Morgan War: Its Conduct and Legal Results, p. 247; 1 Halsbury Laws of England, p. 310; *Sylvester's Case,* 7 Mod. 150; *The Roumanian,* 1915, Prob. Div. 26; affd., 1916, 1 A. C. 124; *Griswold* v. *Waddington,* 16 Johns. 437 [438], 448; *White* v. *Burnley,* 20 How. [U. S.] 235, 249; *The Benito Estenger,* 176 U. S. 568, 571; *Kershaw* v. *Kelsey,* 100 Mass. 561; so all the lexicographers, as, *e. g.,* Webster, Murray, Abbott, Black, Bouvier). . . ." Cardozo, J. in *Techt* v. *Hughes,* 229 N. Y. 222, 229, 128 N. E. 185, 186.

United States, 208 U. S. 8, and has secured citizenship against forfeiture by involuntary formal acts, *Perkins* v. *Elg,* 307 U. S. 325.[3] Because the Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance, Congress has directed the President to exert the full diplomatic and political power of the United States on behalf of any citizen, but of no other, in jeopardy abroad. When any citizen is deprived of his liberty by any foreign government, it is made the duty of the President to demand the reasons and, if the detention appears wrongful, to use means not amounting to acts of war to effectuate his release.[4] It is neither sentimentality nor chauvinism to repeat that "Citizenship is a high privilege." *United States* v. *Manzi,* 276 U. S. 463, 467.

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence,

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[3] For cases in lower courts, see Note, 18 Geo. Wash. L. Rev. 410.

[4] "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." 15 Stat. 224, 8 U. S. C. § 903b.

this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. *The Japanese Immigrant Case,* 189 U. S. 86; *Low Wah Suey* v. *Backus,* 225 U. S. 460; *Tisi* v. *Tod,* 264 U. S. 131; *United States ex rel. Vajtauer* v. *Comm'r,* 273 U. S. 103; *Bridges* v. *Wixon,* 326 U. S. 135; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment. *Yick Wo* v. *Hopkins,* 118 U. S. 356.

But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo* v. *Hopkins,* the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction,* without regard to any differences of race, of color, or of nationality; . . . ." (Italics supplied.) 118 U. S. 356, 369. And in *The Japanese Immigrant Case,* the Court held its processes available to "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here." 189 U. S. 86, 101.

Since most cases involving aliens afford this ground of jurisdiction, and the civil and property rights of immigrants or transients of foreign nationality so nearly approach equivalence to those of citizens, courts in peace time have little occasion to inquire whether litigants before them are alien or citizen.

It is war that exposes the relative vulnerability of the alien's status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us. While his lot is far more humane

and endurable than the experience of our citizens in some enemy lands, it is still not a happy one. But disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage. Judge Cardozo commented concerning this distinction: "Much of the obscurity which surrounds the rights of aliens has its origin in this confusion of diverse subjects." *Techt* v. *Hughes,* 229 N. Y. 222, 237, 128 N. E. 185, 189.

American doctrine as to effect of war upon the status of nationals of belligerents took permanent shape following our first foreign war. Chancellor Kent, after considering the leading authorities of his time, declared the law to be that ". . . in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such." *Griswold* v. *Waddington,* 16 Johns. (N. Y.) 438, 480. If this was ever something of a fiction, it is one validated by the actualities of modern total warfare. Conscription, compulsory service and measures to mobilize every human and material resource and to utilize nationals—wherever they may be—in arms, intrigue and sabotage, attest the prophetic realism of what once may have seemed a doctrinaire and artificial principle. With confirmation of recent history, we may reiterate this Court's earlier teaching that in war "every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country." *The Rapid,* 8 Cranch 155, 161. See also *White* v. *Burnley,* 20 How. 235, 249; *Lamar* v. *Browne,* 92 U. S. 187, 194. And this without regard to his individual sentiments or disposition. *The Benito Estenger,* 176 U. S. 568, 571. The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his alle-

giance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign.

The United States does not invoke this enemy allegiance only for its own interest, but respects it also when to the enemy's advantage. In World War I our conscription act did not subject the alien enemy to compulsory military service. 40 Stat. 885, c. XII, § 4. The Selective Service Act of 1948, 62 Stat. 604, 50 U. S. C. App. § 454 (a), exempts aliens who have not formally declared their intention to become citizens from military training, service and registration, if they make application, but if so relieved, they are barred from becoming citizens. Thus the alien enemy status carries important immunities as well as disadvantages. The United States does not ask him to violate his allegiance or to commit treason toward his own country for the sake of ours. This also is the doctrine and the practice of other states comprising our Western Civilization.[5]

The essential pattern for seasonable Executive constraint of enemy aliens, not on the basis of individual prepossessions for their native land but on the basis of political and legal relations to the enemy government, was laid down in the very earliest days of the Republic and has endured to this day. It was established by the Alien Enemy Act of 1798. 1 Stat. 577, as amended, 50 U. S. C. § 21. And it is to be noted that, while the Alien and Sedition Acts of that year provoked a reaction which helped sweep the party of Mr. Jefferson into power in 1800, and though his party proceeded to undo what was regarded as the mischievous legislation of the Federalists,

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[5] See Delaney, The Alien Enemy and the Draft, 12 Brooklyn L. Rev. 91.

this enactment was never repealed.[6] Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security. This is in keeping with the practices of the most enlightened of nations and has resulted in treatment of alien enemies more considerate than that

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[6] ". . . In 1798, the 5th Congress passed three acts in rapid succession, 'An Act concerning Aliens,' approved June 25, 1798 [1 Stat. 570], 'An Act respecting Alien Enemies,' approved July 6, 1798 [1 Stat. 577, 50 U. S. C. A. § 21 *et seq.*], and 'An Act in addition to the act, entitled "An Act for the punishment of certain crimes against the United States,"' approved July 14, 1798. [1 Stat. 596.] The first and last were the Alien and Sedition Acts, vigorously attacked in Congress and by the Virginia and Kentucky Resolutions as unconstitutional. But the members of Congress who vigorously fought the Alien Act saw no objection to the Alien Enemy Act. [8 Annals of Cong. 2035 (5th Cong., 1798)]. In fact, Albert Gallatin, who led that opposition, was emphatic in distinguishing between the two bills and in affirming the constitutional power of Congress over alien enemies as part of the power to declare war. [*Id.* at 1980.] James Madison was the author of the Virginia Resolutions, and in his report to the Virginia House of Delegates the ensuing year after the deluge of controversy, he carefully and with some tartness asserted a distinction between alien members of a hostile nation and alien members of a friendly nation, disavowed any relation of the Resolutions to alien enemies, and declared, 'With respect to alien enemies, no doubt has been intimated as to the federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies.' [Madison's Report, 4 Elliot's Deb. 546, 554 (1800).] Thomas Jefferson wrote the Kentucky Resolutions, and he was meticulous in identifying the Act under attack as the Alien Act 'which assumes power over alien friends.' [Kentucky Resolutions of 1798 and 1799, 4 Elliot's Deb. 540, 541.] It is certain that in the white light which beat about the subject in 1798, if there had been the slightest question in the minds of the authors of the Constitution or their contemporaries concerning the constitutionality of the Alien Enemy Act, it would have appeared. None did.

"The courts, in an unbroken line of cases from Fries' case [Case of Fries, C. C. D. Pa. 1799, 9 Fed. Cas. at pages 826, 830 *et seq.*,

which has prevailed among any of our enemies and some of our allies. This statute was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation's obligations to its foes could ever be put on a parity with those to its defenders.

The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment. *Ludecke* v. *Watkins,* 335 U. S. 160.[7]

No. 5,126], in 1799 to Schwarzkopf's case [United States ex rel. Schwarzkopf v. Uhl, 2 Cir., 1943, 137 F. 2d 898] in 1943, have asserted or assumed the validity of the Act and based numerous decisions upon the assumption. [Brown v. United States, 1814, 8 Cranch 110, 3 L. Ed. 504; De Lacey v. United States, 9 Cir., 1918, 249 F. 625, L. R. A. 1918E, 1011; Grahl v. United States, 7 Cir., 1919, 261 F. 487; Lockington's Case, Brightly (Pa., 1813) 269, 283; Lockington v. Smith, C. C. D. Pa., 1817, 15 Fed. Cas. page 758, No. 8,448; Ex parte Graber, D. C. N. D. Ala. 1918, 247 F. 882; Minotto v. Bradley, D. C. N. D. Ill. 1918, 252 F. 600; Ex parte Fronklin, D. C. Miss. 1918, 253 F. 984; Ex parte Risse, D. C. S. N. Y. 1919, 257 F. 102; Ex parte Gilroy, D. C. S. D. N. Y. 1919, 257 F. 110.] The judicial view has been without dissent.

"At common law 'alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war.' [1 Blackstone * 372, 373.]" Prettyman, J. in *Citizens Protective League* v. *Clark,* 81 U. S. App. D. C. 116, 119–120, 155 F. 2d 290, 293.

[7] See also Notes, 22 So. Calif. L. Rev. 307; 60 Harv. L. Rev. 456; 47 Mich. L. Rev. 404; 17 Geo. Wash. L. Rev. 578; 27 N. C. L. Rev. 238; 34 Cornell L. Q. 425. In this respect our courts follow the practice of the English courts. 44 Am. J. Int'l L. 382.

The standing of the enemy alien to maintain any action in the courts of the United States has been often challenged and sometimes denied. The general statement was early made on combined authority of Kent and Story "That they have no power to sue in the public courts of the enemy nation." *Griswold* v. *Waddington,* 16 Johns. (N. Y.) 438, 477. Our rule of generous access to the resident enemy alien was first laid down by Chancellor Kent in 1813, when, squarely faced with the plea that an alien enemy could not sue upon a debt contracted before the War of 1812, he reviewed the authorities to that time and broadly declared that "A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity." *Clarke* v. *Morey,* 10 Johns. (N. Y.) 70, 72. A unanimous Court recently clarified both the privilege of access to our courts and the limitations upon it. We said: "The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today." *Ex parte Kawato,* 317 U. S. 69, 75.

But the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy. Our law on this subject first emerged about 1813 when the Supreme Court of the State of New York had occasion, in a series of cases, to examine the foremost authorities of the Continent and of England. It concluded the rule of the common law and the law of nations to be that alien enemies resident in the country of the enemy could not maintain an action in its courts during the period of hostilities. *Bell* v. *Chapman,* 10 Johns. (N. Y.) 183; *Jackson* v. *Decker,* 11

Johns. (N. Y.) 418; *Clarke* v. *Morey,* 10 Johns. (N. Y.) 70, 74–75. This Court has recognized that rule, *Caperton* v. *Bowyer,* 14 Wall. 216, 236; *Masterson* v. *Howard,* 18 Wall. 99, 105, and followed it, *Ex parte Colonna,* 314 U. S. 510, and it continues to be the law throughout this country and in England.[8]

II.

The foregoing demonstrates how much further we must go if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts.

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus.* To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied

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[8] See cases collected in Annotations, 137 A. L. R. 1335, 1355; 1918B L. R. A. 189, 191. See also Borchard, The Right of Alien Enemies to Sue in Our Courts, 27 Yale L. J. 104; Gordon, The Right of Alien Enemies to Sue in American Courts, 36 Ill. L. Rev. 809, 810; Battle, Enemy Litigants in Our Courts, 28 Va. L. Rev. 429; Rylee, Enemy Aliens as Litigants, 12 Geo. Wash. L. Rev. 55, 65; Notes, 5 U. of Detroit L. J. 106, 22 Neb. L. Rev. 36, 30 Calif. L. Rev. 358, 54 Harv. L. Rev. 350.

protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.

Another reason for a limited opening of our courts to resident aliens is that among them are many of friendly personal disposition to whom the status of enemy is only one imputed by law. But these prisoners were actual enemies, active in the hostile service of an enemy power. There is no fiction about their enmity. Yet the decision below confers upon them a right to use our courts, free even of the limitation we have imposed upon resident alien enemies, to whom we deny any use of our courts that would hamper our war effort or aid the enemy.

A basic consideration in *habeas corpus* practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by the Congress; [9] indeed, it is inherent in the very term *"habeas corpus."* [10] And though production of the prisoner may be dispensed with where it appears on the face of the application that no cause for granting the writ exists, *Walker* v. *Johnston,* 312 U. S. 275, 284, we have consistently adhered to and recognized the general rule. *Ahrens* v. *Clark,* 335 U. S. 188, 190–191. To grant the

[9] 28 U. S. C. § 2243 provides in part: "Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

[10] "Habeas corpus . . . thou (shalt) have the body (sc. in court).

"A writ issuing out of a court of justice . . . requiring the body of a person to be brought before the judge or into the court for the purpose specified in the writ; . . . requiring the body of a person restrained of liberty to be brought before the judge or into court, that the lawfulness of the restraint may be investigated and determined." The Oxford English Dictionary (1933), Vol. V, p. 2.

writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Moreover, we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands. The right of judicial refuge from military action, which it is proposed to bestow on the enemy, can purchase no equivalent for benefit of our citizen soldiers. Except in England, whose law appears to be in harmony with the views we have expressed, and other English-speaking peoples in whose practice nothing has been cited to the contrary, the writ of *habeas corpus* is generally unknown.

The prisoners rely, however, upon two decisions of this Court to get them over the threshold—*Ex parte Quirin,* 317 U. S. 1, and *In re Yamashita,* 327 U. S. 1. Reliance on the *Quirin* case is clearly mistaken. Those prisoners were in custody in the District of Columbia. One was, or

claimed to be, a citizen. They were tried by a Military Commission sitting in the District of Columbia at a time when civil courts were open and functioning normally. They were arrested by civil authorities and the prosecution was personally directed by the Attorney General, a civilian prosecutor, for acts committed in the United States. They waived arraignment before a civil court and it was contended that the civil courts thereby acquired jurisdiction and could not be ousted by the Military. None of the places where they were acting, arrested, tried or imprisoned were, it was contended, in a zone of active military operations or under martial law or any other military control, and no circumstances justified transferring them from civil to military jurisdiction. None of these grave grounds for challenging military jurisdiction can be urged in the case now before us.

Nor can the Court's decision in the *Yamashita* case aid the prisoners. This Court refused to receive Yamashita's petition for a writ of *habeas corpus*. For hearing and opinion, it was consolidated with another application for a writ of certiorari to review the refusal of *habeas corpus* by the Supreme Court of the Philippines over whose decisions the statute then gave this Court a right of review. 28 U. S. C. § 349, repealed by Act of June 25, 1948, c. 646, § 39, 62 Stat. 992, 1000. By reason of our sovereignty at that time over these insular possessions, Yamashita stood much as did Quirin before American courts. Yamashita's offenses were committed on our territory, he was tried within the jurisdiction of our insular courts and he was imprisoned within territory of the United States. None of these heads of jurisdiction can be invoked by these prisoners.

Despite this, the doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their

support and to show some reason in the petition why they should not be subject to the usual disabilities of non-resident enemy aliens. This is the same preliminary hearing as to sufficiency of application that was extended in *Quirin, supra, Yamashita, supra,* and *Hirota* v. *MacArthur,* 338 U. S. 197. After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at the same conclusion the Court reached in each of those cases, *viz.:* that no right to the writ of *habeas corpus* appears.

III.

The Court of Appeals dispensed with all requirement of territorial jurisdiction based on place of residence, captivity, trial, offense, or confinement. It could not predicate relief upon any intraterritorial contact of these prisoners with our laws or institutions. Instead, it gave our Constitution an extraterritorial application to embrace our enemies in arms. Right to the writ, it reasoned, is a subsidiary procedural right that follows from possession of substantive constitutional rights. These prisoners, it considered, are invested with a right of personal liberty by our Constitution and therefore must have the right to the remedial writ. The court stated the steps in its own reasoning as follows: "*First.* The Fifth Amendment, by its terms, applies to 'any person.' *Second.* Action of Government officials in violation of the Constitution is void. This is the ultimate essence of the present controversy. *Third.* A basic and inherent function of the judicial branch of a government built upon a constitution is to set aside void action by government officials, and so to restrict executive action to the confines of the constitution. In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power. *Fourth.* The writ

of habeas corpus is the established, time-honored process in our law for testing the authority of one who deprives another of his liberty,—'the best and only sufficient defense of personal freedom.' . . ." 84 U. S. App. D. C. 396, 398–399, 174 F. 2d 961, 963–964.

The doctrine that the term "any person" in the Fifth Amendment spreads its protection over alien enemies anywhere in the world engaged in hostilities against us, should be weighed in light of the full text of that Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

When we analyze the claim prisoners are asserting and the court below sustained, it amounts to a right not to be tried at all for an offense against our armed forces. If the Fifth Amendment protects them from military trial, the Sixth Amendment as clearly prohibits their trial by civil courts. The latter requires in all criminal prosecutions that "the accused" be tried "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." And if the Fifth be held to embrace these prisoners because it uses the inclusive term "no person," the Sixth must, for it applies to all "accused." No suggestion is advanced by the court below, or by prisoners, of any constitutional

method by which any violations of the laws of war endangering the United States forces could be reached or punished, if it were not by a Military Commission in the theatre where the offense was committed.

The Court of Appeals has cited no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses, except to quote extensively from a dissenting opinion in *In re Yamashita,* 327 U. S. 1, 26. The holding of the Court in that case is, of course, to the contrary.

If this Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers. American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans. *Cf. Humphrey* v. *Smith,* 336 U. S. 695; *Wade* v. *Hunter,* 336 U. S. 684. Can there be any doubt that our foes would also have been excepted, but for the assumption "any person" would never be read to include those in arms against us? It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies. And, of course, it cannot be claimed that such shelter is due them as a matter of comity for any reciprocal rights conferred by enemy governments on American soldiers.[11]

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[11] "All merchants, if they were not openly prohibited before, shall have their safe and sure conduct to depart out of England, to come into England, to tarry in, and go through England, as well by land as by water, to buy and sell without any manner of evil tolles by the old and rightful customs, except in time of war; *and if they be of a land making war against us, and be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our*

The decision below would extend coverage of our Constitution to nonresident alien enemies denied to resident alien enemies. The latter are entitled only to judicial hearing to determine what the petition of these prisoners admits: that they are really alien enemies. When that appears, those resident here may be deprived of liberty by Executive action without hearing. *Ludecke* v. *Watkins,* 335 U. S. 160. While this is preventive rather than punitive detention, no reason is apparent why an alien enemy charged with having committed a crime should have greater immunities from Executive action than one who it is only feared might at some future time commit a hostile act.

If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "werewolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. *Cf. Downes* v. *Bidwell,* 182 U. S.

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merchants be entreated who are then found in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us." (Emphasis added.) C. 30 of the Magna Carta, in 3 The Complete Statutes of England (Halsbury's Laws of England 1929) at p. 27.

244. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.

IV.

The Court of Appeals appears to have been of opinion that the petition shows some action by some official of the United States in excess of his authority which confers a private right to have it judicially voided. Its Second and Third propositions were that "action by Government officials in violation of the Constitution is void" and "a basic and inherent function of the judicial branch . . . is to set aside void action by government officials . . . ." For this reason it thought the writ could be granted.

The petition specifies four reasons why conviction by the Military Commission was in excess of its jurisdiction: two based on the Geneva Convention of July 27, 1929, 47 Stat. 2021, with which we deal later; and two apparently designed to raise constitutional questions. The constitutional contentions are that "the detention of the prisoners as convicted war criminals is illegal and in violation of Articles I and III of the Constitution of the United States and of the Fifth Amendment thereto, and of other provisions of said Constitution and laws of the United States . . ., in that:

> "(a) There being no charge of an offense against the laws of war by the prisoners, the Military Commission was without jurisdiction.
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> "(b) In the absence of hostilities, martial law, or American military occupation of China, and in view of treaties between the United States and China

dated February 4, 1943, and May 4, 1943, and between Germany and China, dated May 18, 1921, the Military Commission was without jurisdiction."

The petition does not particularize, and neither does the court below, the specific respects in which it is claimed acts of the Military were *ultra vires.*

The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established. By the Treaty of Versailles, "The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." Article 228. This Court has characterized as "well-established" the "power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." *Duncan* v. *Kahanamoka,* 327 U. S. 304, 312, 313–314. And we have held in the *Quirin* and *Yamashita* cases, *supra,* that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war.[12]

It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission. The petition shows that these prisoners were formally accused of violating the laws of war and fully informed of particulars of these charges. As we observed in the *Yamashita* case, "If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed

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[12] See Green, The Military Commission, 42 Am. J. Int'l L. 832.

facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions." 327 U. S. 1, 8. "We consider here only the lawful power of the commission to try the petitioner for the offense charged." *Ibid.*

That there is a basis in conventional and long-established law by which conduct ascribed to them might amount to a violation seems beyond question. Breach of the terms of an act of surrender is no novelty among war crimes. "That capitulations must be scrupulously adhered to is an old customary rule, since enacted by Article 35 of the Hague Regulations.[13] Any act contrary to a capitulation would constitute an international delinquency if ordered by a belligerent Government, and a war crime if committed without such order. Such violation may be met by reprisals or punishment of the offenders as war criminals." II Oppenheim, International Law 433 (6th ed. rev., Lauterpacht, 1944). Vattel tells us: "If any of the subjects, whether military men or private citizens, offend against the truce . . . the delinquents should be compelled to make ample compensation for the damage, and severely punished. . . ." Law of Nations,

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[13] Article XXXV of Convention IV signed at The Hague, October 18, 1907, 36 Stat. 2277, 2305, provides: "Capitulations agreed upon between the contracting parties must take into account the rules of military honour.

"Once settled, they must be scrupulously observed by both parties."

And see VII Moore, International Law Digest (1906) 330: "If there is one rule of the law of war more clear and peremptory than another, it is that compacts between enemies, such as truces and capitulations, shall be faithfully adhered to; and their non-observance is denounced as being manifestly at variance with the true interest and duty, not only of the immediate parties, but of all mankind. Mr. Webster, Sec. of State, to Mr. Thompson, Apr. 5, 1842, 6 Webster's Works, 438."

Book III, c. XVI, § 241. And so too, Lawrence, who says, "If . . . the breach of the conditions agreed upon is the act of unauthorized individuals, the side that suffers . . . may demand the punishment of the guilty parties and an indemnity for any losses it has sustained." Principles of International Law (5th ed.) p. 566. It being within the jurisdiction of a Military Commission to try the prisoners, it was for it to determine whether the laws of war applied and whether an offense against them had been committed.

We can only read "(b)" to mean either that the presence of the military forces of the United States in China at the times in question was unconstitutional or, if lawfully there, that they had no right under the Constitution to set up a Military Commission on Chinese territory. But it can hardly be meant that it was unconstitutional for the Government of the United States to wage a war in foreign parts. Among powers granted to Congress by the Constitution is power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. Art. I, § 8, Const. It also gives power to make rules concerning captures on land and water, *ibid.*, which this Court has construed as an independent substantive power. *Brown* v. *United States,* 8 Cranch 110, 126. Indeed, out of seventeen specific paragraphs of congressional power, eight of them are devoted in whole or in part to specification of powers connected with warfare. The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. Art. II, § 2, Const. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution.

Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. China appears to have fully consented to the trial within her territories and, if China had complaint at the presence of American forces there, China's grievance does not become these prisoners' right. The issue tendered by "(b)" involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103.

These prisoners do not assert, and could not, that anything in the Geneva Convention makes them immune from prosecution or punishment for war crimes.[14] Article 75 thereof expressly provides that a prisoner of war may be detained until the end of such proceedings and, if necessary, until the expiration of the punishment. 47 Stat. 2021, 2055.

The petition, however, makes two claims in the nature of procedural irregularities said to deprive the Military Commission of jurisdiction. One is that the United States was obliged to give the protecting power of Ger-

[14] We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

many notice of the trial, as specified in Article 60 of the Convention. This claim the Court has twice considered and twice rejected, holding that such notice is required only of proceedings for disciplinary offenses committed during captivity and not in case of war crimes committed before capture. *Ex parte Quirin, supra; Ex parte Yamashita, supra.*

The other claim is that they were denied trial "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power," required by Article 63 of the Convention. It may be noted that no prejudicial disparity is pointed out as between the Commission that tried prisoners and those that would try an offending soldier of the American forces of like rank. By a parity of reasoning with that in the foregoing decisions, this Article also refers to those, and only to those, proceedings for disciplinary offenses during captivity. Neither applies to a trial for war crimes.

We are unable to find that the petition alleges any fact showing lack of jurisdiction in the military authorities to accuse, try and condemn these prisoners or that they acted in excess of their lawful powers.

V.

The District Court dismissed this petition on authority of *Ahrens* v. *Clark,* 335 U. S. 188. The Court of Appeals considered only questions which it regarded as reserved in that decision and in *Ex parte Endo,* 323 U. S. 283. Those cases dealt with persons both residing and detained within the United States and whose capacity and standing to invoke the process of federal courts somewhere was unquestioned. The issue was where.

Since in the present application we find no basis for invoking federal judicial power in any district, we need

not debate as to where, if the case were otherwise, the petition should be filed.

For reasons stated, the judgment of the Court of Appeals is reversed and the judgment of the District Court dismissing the petition is affirmed.

Reversed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON concur, dissenting.

Not only is United States citizenship a "high privilege," it is a priceless treasure. For that citizenship is enriched beyond price by our goal of equal justice under law—equal justice not for citizens alone, but for all persons coming within the ambit of our power. This ideal gave birth to the constitutional provision for an independent judiciary with authority to check abuses of executive power and to issue writs of habeas corpus liberating persons illegally imprisoned.[1]

This case tests the power of courts to exercise habeas corpus jurisdiction on behalf of aliens, imprisoned in Germany, under sentences imposed by the executive through military tribunals. The trial court held that, because the persons involved are imprisoned overseas, it had no territorial jurisdiction even to consider their petitions. The Court of Appeals reversed the District Court's dismissal on the ground that the judicial rather than the executive branch of government is vested with final authority to determine the legality of imprisonment for crime. 84 U. S. App. D. C. 396, 174 F. 2d 961. This Court now affirms the District Court's dismissal. I agree with the Court of Appeals and need add little to the

[1] Article I, § 9, cl. 2 of the Constitution provides:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

cogent reasons given for its decision. The broad reach of today's opinion, however, requires discussion.

First. In Part IV of its opinion the Court apparently bases its holding that the District Court was without jurisdiction on its own conclusion that the petition for habeas corpus failed to show facts authorizing the relief prayed for. But jurisdiction of a federal district court does not depend on whether the initial pleading sufficiently states a cause of action; if a court has jurisdiction of subject matter and parties, it should proceed to try the case, beginning with consideration of the pleadings. *Bell* v. *Hood,* 327 U. S. 678, 682–683; *Ex parte Kawato,* 317 U. S. 69, 71.[2] Therefore Part IV of the opinion is wholly irrelevant and lends no support whatever to the Court's holding that the District Court was without jurisdiction.

Moreover, the question of whether the petition showed on its face that these prisoners had violated the laws of war, even if it were relevant, is not properly before this Court. The trial court did not reach that question because it concluded that their imprisonment outside its district barred it even from considering the petition; its doors were "summarily closed." And in reversing, the Court of Appeals specifically rejected requests that it consider the sufficiency of the petition, properly remanding the cause to the District Court for that determination—just as this Court did in the *Hood* and *Kawato* cases, *supra.* The Government's petition for certiorari here presented no question except that of jurisdiction; and neither party has argued, orally or in briefs, that this Court should pass on the sufficiency of the petition.

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[2] Cases are occasionally dismissed where the claims are "wholly insubstantial and frivolous," *Bell* v. *Hood, supra,* but the very complexity of this Court's opinion belies any such classification of this petition.

To decide this unargued question under these circumstances seems an unwarranted and highly improper deviation from ordinary judicial procedure. At the very least, fairness requires that the Court hear argument on this point.

Despite these objections, the Court now proceeds to find a "war crime" in the fact that after Germany had surrendered these prisoners gave certain information to Japanese military forces. I am not convinced that this unargued question is correctly decided. The petition alleges that when the information was given, the accused were "under the control of the armed forces of the Japanese Empire," in Japanese-occupied territory. Whether obedience to commands of their Japanese superiors would in itself constitute "unlawful" belligerency in violation of the laws of war is not so simple a question as the Court assumes. The alleged circumstances, if proven, would place these Germans in much the same position as patriotic French, Dutch, or Norwegian soldiers who fought on with the British after their homelands officially surrendered to Nazi Germany. There is not the slightest intimation that the accused were spies, or engaged in cruelty, torture, or any conduct other than that which soldiers or civilians might properly perform when entangled in their country's war. It must be remembered that legitimate "acts of warfare," however murderous, do not justify criminal conviction. In *Ex parte Quirin,* 317 U. S. 1, 30–31, we cautioned that military tribunals can punish only "unlawful" combatants; it is no "crime" to be a soldier. See also *Dow* v. *Johnson,* 100 U. S. 158, 169; *Ford* v. *Surget,* 97 U. S. 594, 605–606. Certainly decisions by the trial court and the Court of Appeals concerning applicability of that principle to these facts would be helpful, as would briefs and arguments by the adversary parties. It should not be decided by this Court now without that assistance, particularly since

failure to remand deprives these petitioners of any right to meet alleged deficiencies by amending their petitions.

Second. In Parts I, II, and III of its opinion, the Court apparently holds that no American court can even consider the jurisdiction of the military tribunal to convict and sentence these prisoners for the alleged crime. Except insofar as this holding depends on the gratuitous conclusions in Part IV (and I cannot tell how far it does), it is based on the facts that (1) they were enemy aliens who were belligerents when captured, and (2) they were captured, tried, and imprisoned outside our realm, never having been in the United States.

The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court. In *Ex parte Quirin,* 317 U. S. 1, we held that status as an enemy alien did not foreclose "consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." *Id.* at 25. This we did in the face of a presidential proclamation denying such prisoners access to our courts. Only after thus upholding jurisdiction of the courts to consider such habeas corpus petitions did we go on to deny those particular petitions upon a finding that the prisoners had been convicted by a military tribunal of competent jurisdiction for conduct that we found constituted an actual violation of the law of war. Similarly, in *Yamashita* v. *United States,* 327 U. S. 1, we held that courts could inquire whether a military commission, promptly after hostilities had ceased, had lawful authority to try and condemn a Japanese general charged with violating the law of war before hostilities had ceased. There we stated: "[T]he Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to

make such inquiry into the authority of the commission as may be made by habeas corpus." *Id.* at 9. That we went on to deny the requested writ, as in the *Quirin* case, in no way detracts from the clear holding that habeas corpus jurisdiction is available even to belligerent aliens convicted by a military tribunal for an offense committed in actual acts of warfare.

Since the Court expressly disavows conflict with the *Quirin* or *Yamashita* decisions, it must be relying not on the status of these petitioners as alien enemy belligerents but rather on the fact that they were captured, tried and imprisoned outside our territory. The Court cannot, and despite its rhetoric on the point does not, deny that if they were imprisoned in the United States our courts would clearly have jurisdiction to hear their habeas corpus complaints. Does a prisoner's right to test legality of a sentence then depend on where the Government chooses to imprison him? Certainly the *Quirin* and *Yamashita* opinions lend no support to that conclusion, for in upholding jurisdiction they place no reliance whatever on territorial location. The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations.

If the opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle. The range of that principle is underlined by the argument of the Government brief that habeas corpus is not even available for American citizens convicted and imprisoned in Germany by American military tribunals. While the Court wisely disclaims any such necessary effect for its holding, rejection of the Government's argument is certainly made difficult by the logic of today's

opinion. Conceivably a majority may hereafter find citizenship a sufficient substitute for territorial jurisdiction and thus permit courts to protect Americans from illegal sentences. But the Court's opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared.[3]

Third. It has always been recognized that actual warfare can be conducted successfully only if those in command are left the most ample independence in the theatre of operations. Our Constitution is not so impractical or inflexible that it unduly restricts such necessary independence. It would be fantastic to suggest that alien enemies could hail our military leaders into judicial tribunals to account for their day-to-day activities on the battlefront. Active fighting forces must be free to fight while hostilities are in progress. But that undisputable axiom has no bearing on this case or the general problem from which it arises.

When a foreign enemy surrenders, the situation changes markedly. If our country decides to occupy conquered territory either temporarily or permanently, it assumes the problem of deciding how the subjugated people will be ruled, what laws will govern, who will promulgate them, and what governmental agency of ours will see that they are properly administered. This responsibility immediately raises questions concerning the extent to which our domestic laws, constitutional and statutory, are transplanted abroad. Probably no one would suggest, and certainly I would not, that this nation either must or should attempt to apply every constitu-

[3] The Court indicates that not even today can a nonresident German or Japanese bring even a civil suit in American courts. With this restrictive philosophy compare *Ex parte Kawato,* 317 U. S. 69; see also *McKenna* v. *Fisk,* 1 How. 241, 249.

tional provision of the Bill of Rights in controlling temporarily occupied countries. But that does not mean that the Constitution is wholly inapplicable in foreign territories that we occupy and govern. See *Downes* v. *Bidwell,* 182 U. S. 244.

The question here involves a far narrower issue. Springing from recognition that our government is composed of three separate and independent branches, it is whether the judiciary has power in habeas corpus proceedings to test the legality of criminal sentences imposed by the executive through military tribunals in a country which we have occupied for years. The extent of such a judicial test of legality under charges like these, as we have already held in the *Yamashita* case, is of most limited scope. We ask only whether the military tribunal was legally constituted and whether it had jurisdiction to impose punishment for the conduct charged. Such a limited habeas corpus review is the right of every citizen of the United States, civilian or soldier (unless the Court adopts the Government's argument that Americans imprisoned abroad have lost their right to habeas corpus). Any contention that a similarly limited use of habeas corpus for these prisoners would somehow give them a preferred position in the law cannot be taken seriously.

Though the scope of habeas corpus review of military tribunal sentences is narrow, I think it should not be denied to these petitioners and others like them. We control that part of Germany we occupy. These prisoners were convicted by our own military tribunals under our own Articles of War, years after hostilities had ceased. However illegal their sentences might be, they can expect no relief from German courts or any other branch of the German Government we permit to function. Only our own courts can inquire into the legality of their imprisonment. Perhaps, as some nations believe, there is merit in leaving the administration of criminal laws

to executive and military agencies completely free from judicial scrutiny. Our Constitution has emphatically expressed a contrary policy.

As the Court points out, Paul was fortunate enough to be a Roman citizen when he was made the victim of prejudicial charges; that privileged status afforded him an appeal to Rome, with a right to meet his "accusers face to face." Acts 25:16. But other martyrized disciples were not so fortunate. Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice.

Conquest by the United States, unlike conquest by many other nations, does not mean tyranny. For our people "choose to maintain their greatness by justice rather than violence." [4] Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies. Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress. I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern.[5] Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.

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[4] This goal for government is not new. According to Tacitus, it was achieved by another people almost 2,000 years ago. See 2 Works of Tacitus 326 (Oxford trans., New York, 1869).

[5] See the concurring opinion of MR. JUSTICE DOUGLAS in *Hirota* v. *MacArthur,* 338 U. S. 197, 199.

UNITED STATES v. KANSAS CITY LIFE INSURANCE CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 1. Argued October 20, 1948.—Reargued March 29, 1950.—Decided June 5, 1950.

Respondent owned farm land in Missouri on a nonnavigable tributary of a navigable river, the land not being in any sense within the bed of the river. In the interest of navigation, the United States constructed on the river a dam which maintained the river continuously at ordinary high-water level. As a result, the agricultural value of part of respondent's land was destroyed by underflowing. *Held:*

1. The United States was liable for the destruction of the agricultural value of the land above the ordinary high-water mark of the river, even though maintenance of the river continuously at that mark was in the interest of navigation. Pp. 804–808.

(a) The ordinary high-water mark is the limit of the bed of the stream; and the navigation servitude does not extend to respondent's land beyond the bed of the navigable river. Pp. 805–808.

2. The destruction of the agricultural value of the land was a taking of private property for public use within the meaning of the Fifth Amendment of the Federal Constitution, even though there was no actual overflowing of the land. Pp. 809–811.

3. The findings of the Court of Claims in this case sufficiently describe the interest taken by the United States and for which an award of compensation was made to respondent. Pp. 811–812.

109 Ct. Cl. 555, 74 F. Supp. 653, affirmed.

The Court of Claims made an award of compensation to respondent on a claim against the United States for a taking of property of the respondent for public use. 109 Ct. Cl. 555, 74 F. Supp. 653. This Court granted certiorari. 334 U. S. 810. *Affirmed*, p. 812.

Frederick Bernays Wiener argued the cause on the original argument and *Marvin J. Sonosky* on the reargu-

ment for the United States. With *Mr. Wiener* on the brief on the original argument and with *Mr. Sonosky* on the brief on the reargument were *Solicitor General Perlman* and *Assistant Attorney General Vanech*. *Roger P. Marquis* was also on the brief on the original argument, and *Ralph S. Boyd* was also on the brief on the reargument.

Stanley Bassett argued the cause for respondent. With him on the brief was *Ray B. Lucas*.

Mr. Justice Burton delivered the opinion of the Court.

The respondent, Kansas City Life Insurance Company, obtained judgment in the Court of Claims against the United States for $22,519.60, with interest from August 8, 1938. 109 Ct. Cl. 555, 74 F. Supp. 653. This sum was awarded as just compensation for the destruction of the agricultural value of respondent's farm land by the United States in artificially maintaining the Mississippi River in that vicinity continuously at ordinary high-water level. The land was not in any sense within the bed of the river. It was one and one-half miles from the river on a nonnavigable tributary creek. Its surface was a few feet above the ordinary high-water level of both the river and the creek. The United States, however, contended that because it maintained the river at this level in the interest of navigation it need not pay for the resulting destruction of the value of the respondent's land. We granted certiorari because of the importance of the constitutional questions raised. 334 U. S. 810. The case was argued at the 1948 Term and reargued at this Term.

Two principal issues are presented. The first is whether the United States, in the exercise of its power to regulate commerce, may raise a navigable stream to its ordinary high-water mark and maintain it continuously at that level in the interest of navigation, without liability for

the effects of that change upon private property beyond the bed of the stream. If the United States may not do so, without such liability, we reach the other issue: Whether the resulting destruction of the agricultural value of the land affected, without actually overflowing it, is a taking of private property within the meaning of the Fifth Amendment to the Constitution of the United States. We decide both issues in favor of the respondent, the first in the negative, the second in the affirmative.

The material facts found by the court below include the following:

Respondent is the owner of 1,710 acres of farm land in Missouri, having an elevation of 422.7 to 428 feet above sea level. The land borders on Dardenne Creek, a nonnavigable tributary entering the navigable Mississippi River one and one-half miles below the farm. The agricultural value of the land has been largely destroyed by the construction and operation by the United States of Lock and Dam No. 26 on the Mississippi at Alton, Illinois, 25 miles below Dardenne Creek. The United States has operated this dam since August 8, 1938, as part of a system of river improvements to provide a navigable channel in the Mississippi between Minneapolis and the mouth of the Missouri.[1] The effect of the dam has been to raise the level of the Mississippi at the mouth of Dardenne Creek to a permanent stage of 420.4 feet above sea level. This was its previously ascertained ordinary high-water mark.

Before the effect of the dam was felt, the respondent's land drained adequately through its subsoil and a simple system of ditches and pipes emptying into the creek.[2] It

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[1] 46 Stat. 918, 927; 49 Stat. 1028, 1034. As to the same system of improvement, see *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592.

[2] Before August 8, 1938, during about 75% of each year, the river did not exceed a stage of 419.6 feet at Dardenne Creek. From 1930

was highly productive. When, however, the dam raised the river and the creek to 420.4 feet and maintained the water continuously at that level, this destroyed the agricultural value of the respondent's land at surface elevations between 423.5 and 425 feet.[3] The damage was caused by the underflowing of the land.[4] This undersurface invasion was substantially as destructive as if the

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to 1937, between June 21 and September 21, it averaged 413.9 feet. For several months at the beginning and end of a year, its stage was 410 feet or less. The bed of the creek at respondent's farm was 410 to 413 feet above sea level. The water in the creek created a stage of 412 to 416 feet.

[3] Although, as stated in the text, the Mississippi River, at 420.4 feet, destroyed the agricultural value of certain parts of the respondent's land, it did not perceptibly change the value of the respondent's wet land below 423.5 feet or of its dry land above 425 feet. No compensation was allowed for the 602.04 acres so located.

[4] The court below made extended findings as to the expectation of the Army Engineers that damages, comparable to those which did occur, would result to respondent's land. The Engineers recommended that the United States purchase the land. House Committee on Rivers and Harbors, Doc. No. 34, 73d Cong., 2d Sess. (1934), and House Committee on Rivers and Harbors, Doc. No. 34, 75th Cong., 1st Sess. 14, 55–56 (1937). The project was authorized by Congress and power to condemn the land was given to the Secretary of War August 26, 1937, 50 Stat. 844, 848. However, the court below concluded correctly that—

"The Government did not, in fact, purchase or acquire by eminent domain a portion of the plaintiff's land, as the Army Engineers had recommended, or ditch and tile another portion, as they had recommended. It just went ahead and built its lock and dam. The plaintiff still owns its land. We think that the legislation quoted above, while it might have constituted an authorization to acquire some of the plaintiff's land by eminent domain, and to spend money in tiling and ditching another part of it, does not constitute a Congressional waiver of immunity from suit or confession of liability for the consequences of building the dam." 109 Ct. Cl. at p. 574, 74 F. Supp. at p. 654.

See *Mitchell* v. *United States*, 267 U. S. 341, 345; *United States* v. *Alexander*, 148 U. S. 186, 188–190.

land had been submerged. The water table was raised both by the percolation of the water which rose and fell with the river and by the resulting blockade of the drainage of the land's surface and subsurface water.[5] The

[5] The Court of Claims found that—

"16. Underneath the clay soil on plaintiff's land, there is a stratum of water-bearing sand, the top elevation of which varies from 412 to 414 feet above mean sea level. The water in the sand is affected by the rise and fall of the Mississippi River and the water table under the land rises and falls in response to high or low water conditions in the river. The water level in the underground strata is also affected by rainfall on the land, because the sand stratum acts as a reservoir for water which drains vertically from the surface of the ground.

. . . . . .

"18. The average pool elevation which has been maintained at the mouth of Dardenne Creek by operation of Dam 26 is 420.4 feet, and the elevation of the water in Dardenne Creek adjacent to plaintiff's farm has been raised from six to seven feet above the previous normal level. As a result of the operation of the dam, the surface of the water in the creek has been raised so that the creek water now backs into some of the outlet pipes in the plaintiff's levee, thereby obstructing and delaying the drainage of surface water from plaintiff's land. In addition, by maintaining the surface of the water in the creek to an elevation of 420 feet or more above sea level, the drainage of the underground water from a large portion of the plaintiff's farm has been almost entirely shut off. Prior to the construction of the dam this underground water drained through the sand strata under the land into the creek, which was normally only 2 or 3 feet deep at that time.

"19. . . . Since the dam has been in operation, the conditions and the period of time, formerly available for draining the land and drying the soil, no longer exist.

"20. As a result of the river stage being controlled by the operation of the dam, the water table under plaintiff's land is from four to five feet higher than it was during the low stages of the Mississippi prior to the erection of the dam. Under controlled river conditions, the water table beneath plaintiff's land has been raised to an elevation varying from 420.5 feet to 422 feet, or an average of from one to two feet higher than the controlled river stage at Dixon's Landing. [The elevation of the river at Dixon's Landing was about the same as at

reduction of $22,519.60 in the market value of the land is not disputed.

It is well settled that, under the Commerce Clause, U. S. Const. Art. I, § 8, Cl. 3, the United States has the power to improve its navigable waters in the interest of navigation without liability for damages resulting to private property within the bed of the navigable stream.

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the mouth of Dardenne Creek.] The drainage of the underground water from beneath a large area of plaintiff's land has almost ceased. On some portions of the land, vertical drainage from the surface to the underlying sand stratum has been cut off and on other portions it has been greatly retarded as a result of the increased height of the water table.

"21. The effects of the operation of the dam became apparent within a short time after the full pool stage was obtained on August 8, 1938. After a rain, the surface of the soil dried out much more slowly than before and the drainage ditches did not carry off the water as readily. Excessive moisture was retained in the soil and the planting of crops was delayed. Even when the surface appeared to be dry, the ground underneath was wet and would not support tractors and other farm machinery, which became mired down and had to cease operations. Seed planted on some portions of the land failed to germinate and would rot. It was not possible to follow a proper crop rotation program. Because the soil was often too wet for planting some crops, it was necessary to substitute other crops which mature in a shorter time." 109 Ct. Cl. at pp. 565–569.

In its opinion, the Court of Claims concluded that—

"The construction of Lock and Dam No. 26 raised the level of the water in the river and the creek, when the pool behind the dam was filled in 1938, to 420.4 feet above mean sea level, which was approximately the altitude of ordinary high water level before the construction of the lock and dam. We have found that the consequence of this raising of the water level in the creek has been to shut off the flow of some of the tubes leading through the levee and thereby prevent the surface water from draining off some of the land. A more serious consequence, however, has been that it has prevented water in the strata underneath the plaintiff's land from draining away, thus keeping the underground water within one, two, or three feet from the surface of different portions of the plaintiff's land, thereby impairing its value for farming." *Id.* at p. 573, 74 F. Supp. at p. 653.

> "The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. [Citing cases.] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596–597.[6]

The ordinary high-water mark has been accepted as the limit of the bed of the stream. In *United States* v. *Willow River Power Co.*, 324 U. S. 499, 509, where compensation was denied, this Court said: "High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid. But the award here does not purport to compensate a flooding of fast lands or impairment of their value. Lands below that level are subject always to a dominant servitude in the interests of navigation and its exercise calls for no compensation."

These cases point the way to our decision in the instant case. In the *Chicago* case, *supra*, the United States insti-

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[6] *Willink* v. *United States*, 240 U. S. 572; *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251; *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U. S. 82. Loss of access to a navigable stream is not compensable. *Scranton* v. *Wheeler*, 179 U. S. 141; *Gibson* v. *United States*, 166 U. S. 269. See also, *United States* v. *Commodore Park*, 324 U. S. 386. A change in the flow of a navigable stream does not deprive the private user of that stream, for power purposes, of a compensable right. *United States* v. *Willow River Power Co.*, 324 U. S. 499; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53.

tuted condemnation proceedings to acquire the right to back the waters of the Mississippi over a right of way and against an embankment owned by the respondent railroad and telegraph companies. The precise issue was the Government's liability for damage done to that embankment by raising the waters of the river to and above their ordinary high-water mark. The respondents contended that the damage even to that part of the embankment which stood on land within the bed of the river was compensable and the Court of Appeals so held. 113 F. 2d 919. This Court reversed that judgment for the reason that all land within the bed of a navigable stream is subject to a servitude in favor of the United States, relieving it from liability for damages to such land resulting from governmental action in the interest of navigation. In addition, this Court remanded the case for determination of the disputed claim of the respondents that three other segments of their embankment were on land which was above the ordinary high-water mark of the river and that two of those segments abutted not on the Mississippi River but on a nonnavigable tributary. 312 U. S. at p. 599. The order to determine that question indicates that the basis of the decision was that the navigation servitude does not extend to land beyond the bed of the navigable river.

The opinion in the *Chicago* case also sheds light upon the earlier cases. It limits the decisions in *United States* v. *Lynah,* 188 U. S. 445, and *United States* v. *Cress,* 243 U. S. 316, so that they do not conflict with the Government's dominant servitude when it is applied to the bed of a navigable stream. In the *Kelly* case, which is reported with the *Cress* case, the land in question was on a nonnavigable tributary of the navigable Kentucky River. The Government's dam raised the waters of the river which, in turn, raised those of the tributary across which Kelly had built a mill dam. This Court upheld the judgment

requiring the United States to pay Kelly for the loss of his power head at his mill which resulted from this change in the level of the tributary. Similarly, in the *Cress* case itself, this Court assumed that a tributary of the Cumberland River was not navigable. It then allowed recovery for the destruction of the value of the land and of a ford across the tributary. All of this destruction was caused by the Government's dam on the river but was done at points beyond the bed of that river. In the *Chicago* case, this Court's view of the *Cress* decision was expressed as follows:

> "What was said in the *Cress* case must be confined to the facts there disclosed. In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the [nonnavigable] stream were held entitled to compensation for the damage to their lands. The question here presented was not discussed in the opinion." 312 U. S. at p. 597.

The extent of the Government's paramount power over the bed of navigable streams was further clarified in *United States* v. *Willow River Power Co., supra.* The respondent there claimed compensation for the reduction of a power head, which reduction was caused by a Government dam which raised the level of the navigable river into which the respondent dropped the water from its dam built on a nonnavigable tributary. Compensation was denied on the ground that because the loss of power to the respondent occurred within the bed of the navigable river, such loss was covered by the Government's dominant power to change the river's level in the interest of navigation. This Court said:

> "We are of opinion that the *Cress* case does not govern this one and that there is no warrant for

> applying it, as the claimant asks, or for overruling it, as the Government intimates would be desirable. . . . In the former case the navigation interest was held not to be a dominant one at the property damaged; here dominance of the navigation interest at the St. Croix [the navigable river] is clear." 324 U. S. at p. 506.

It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. See Gould on Waters, c. IV, §§ 86–90 (1883); I Farnham, Waters and Water Rights, c. III, § 29 (1904). This has applied to the stream and to the land submerged by the stream. There thus has been ample notice over the years that such property is subject to a dominant public interest. This right of the public has crystallized in terms of a servitude over the bed of the stream. The relevance of the high-water level of the navigable stream is that it marks its bed. Accordingly, it is consistent with the history and reason of the rule to deny compensation where the claimant's private title is burdened with this servitude but to award compensation where his title is not so burdened.[7]

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[7] This is clearly illustrated in *United States* v. *Chicago, M., St. P. & P. R. Co., supra.* The United States raised the level of the navigable river above its ordinary high-water mark. This Court then declined to allow compensation for the damage caused to the segment of the respondent's embankment which concededly was located on land within the bed of the river. On the other hand, the lower court

The next question is whether or not the Government's destruction of the agricultural value of the respondent's land in this case amounted to a taking of private property for public use within the meaning of the Fifth Amendment.

This case comes within the principle that the destruction of privately owned land by flooding is "a taking" to the extent of the destruction caused. The decisions in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah, supra; United States* v. *Williams,* 188 U. S. 445, and same case, 104 F. 50, 53; *United States* v. *Welch,* 217 U. S. 333; and *United States* v. *Cress, supra,* illustrate the development of that principle.[8] Although they have been

awarded compensation for the damage done to such segments of the embankment as concededly were on land above the bed of the river. No appeal was taken from that award. Finally, as to three other segments with regard to which there was a disagreement as to whether or not they were on land within the bed of the river, this Court remanded the case to the District Court to resolve that factual issue.

[8] In interpreting a like provision in the Constitution of Wisconsin, this Court held that continuous flooding amounted to a taking of the land flooded. It said:

". . . it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle." *Pumpelly* v. *Green Bay Co., supra,* at p. 181.

The above case was quoted with approval in *Scranton* v. *Wheeler,* 179 U. S. 141, 154, and in *United States* v. *Lynah, supra,* at p. 469. The last named case involved seepage, percolation and some flooding which turned the land into a bog.

In the *Cress* case, after discussing and approving the reasoning in the *Green Bay* and *Lynah* cases, the Court said:

"There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent

limited by later decisions in some respects, the above cases have been accepted and followed in this respect. *United States* v. *Chicago, M., St. P. & P. R. Co., supra,* at pp. 597–598; [9] *United States* v. *Commodore Park,* 324 U. S. 386; *United States* v. *Willow River Power Co., supra;* and see *United States* v. *Causby,* 328 U. S. 256.

The findings in the instant case show that the land was permanently invaded by the percolation of the waters from both the river and its tributary. The percolation raised the water table and soaked the land sufficiently to destroy its agricultural value. The continuous presence of this raised water table also blocked the drainage of the surface and subsurface water in a manner which helped to destroy the productivity of the land.[10] Whether the prevention of the use of the land for agricultural purposes was due to its invasion by water from above or from below, it was equally effective. The destruction of land value, without some actual invasion of the land and solely by preventing the escape of its own surface water, is not before us. Even such a situation would come within the *Cress* case if it were established under Missouri law that the owner of land on a nonnavigable stream

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liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain." 243 U. S. at pp. 328–329.

[9] In the *Chicago* case this Court overruled the *Lynah* case, *supra,* insofar as it upheld compensation "for injury or destruction of a riparian owner's property located in the bed of a navigable stream." 312 U. S. at p. 598. The Court, however, expressly mentioned that case as an authority on the point that the flooding of land, as there done, amounted to a compensable taking of it.

[10] See note 5, *supra.*

has a right to the unobstructed drainage of that land.[11]

One point remains. The Government contends that the findings of the court below do not properly describe the interest taken. That court found:

> "29. The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes." 109 Ct. Cl. at p. 572.

The above statement, read in its context, permits the United States to maintain the level of the river and its tributary at 420.4 feet above sea level with the effect on the respondent's land that has been described. This

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[11] Based upon the law of Kentucky, upholding the right of a landowner on a nonnavigable creek to have the benefit of the unobstructed flow of that creek, this Court allowed the landowner compensation in the *Kelly* case, which is reported with the *Cress* case. The Court there said: "The right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land." 243 U. S. at p. 330.

Although the court below reached no express conclusion on the right of respondent to drain its land into Dardenne Creek, there is no indication that such drainage was not a lawful incident of the property ownership. Under Missouri law, the owner of land bordering on a nonnavigable stream has title to the bed of the stream to its center, unless the instruments of title show a contrary intent. *Brown* v. *Wilson,* 348 Mo. 658, 665, 155 S. W. 2d 176, 179. Also, a downstream riparian owner has no right to dam the stream so as to cause it to accumulate water and flow it back on the land of upstream riparian owners. *Keener* v. *Sharp,* 341 Mo. 1192, 111 S. W. 2d 118, and see *Greisinger* v. *Klinhardt,* 321 Mo. 186, 193, 9 S. W. 2d 978, 980–981.

meets the requirements for a valid description of the interest taken as indicated in *United States* v. *Causby*, 328 U. S. 256, 267.

The judgment of the Court of Claims accordingly is

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE MINTON concur, dissenting.

What respondent here purports to claim is a property right in the unfettered flow of Dardenne Creek in its natural state. But what respondent in substance claims is a property right in the unfettered flow of the Mississippi in its natural state. The two are necessarily the same, for water seeks its own level. No such right accrues to one who owns the shore and bed of the great river, until that river is raised above high-water mark. And we think that one who is riparian to a tributary has no greater claim upon the flow of the Mississippi. For this Court has held it to be "inconceivable" that "the running water in a great navigable stream is capable of private ownership." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69. It would be incongruous to deny compensation to owners adjacent to navigable rivers and require it for others bordering their tributaries for like injuries caused by the single act of lifting the river's mean level to the high-water mark. Because water seeks its own level, raising the level of the river necessarily raises that of the tributary at their conjunction and as far upstream on each as the effects of the lifting may go. These facts are equally apparent to both types of owners. We think they should be anticipated by both, and that the one has no more power to obstruct or burden the power of Congress in its control of the river's bed in the interest of navigation than the other. Neither has any greater right to have the river flow in its natural state than the other.

Basically the problem in this case is to locate a workable and reasonable boundary between Congress' power to control navigation in the public interest and the rights of landowners adjacent to navigable streams and their tributaries to compensation for injuries flowing from the exercise of that power. The Constitution does not require compensation for all injuries inflicted by the exercise of Congress' power. Neither is the power unlimited. The line therefore must be drawn in accommodation of the two interests. This could be done, as it was in *United States* v. *Cress,* 243 U. S. 316, by allowing compensation for all injuries inflicted by any change in the natural level and flow of the stream; it can be done, as in *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592 and *United States* v. *Willow River Co.,* 324 U. S. 499, by allowing change in the natural flow to the extent of lifting the mean level to high-water mark without liability for constitutional compensation; it could be done by applying the latter rule to owners riparian to the navigable stream, the former to those riparian to nonnavigable tributaries.

There is no sound reason for treating the two types of owners differently. Congress has power to regulate commerce by raising the level of a navigable stream to high-water mark without liability for compensation to any riparian owner. The effect upon the riparian owner of the river's tributaries, whether navigable or nonnavigable, is the same as that upon the owner riparian to the river itself. So is the congressional power and the dominant servitude. In this view no vested private right is given to anyone, as against the public interest, in the full utilization and control of the river's bed for navigation or in the flow of the stream within it. If Congress acts beyond this limit, then the Amendment will come into play to protect the landowner's interest.

This view requires the overruling of the *Cress* case. But until today's ruling the *Cress* case had been largely

destroyed by intervening decisions. See *United States* v. *Chicago, M., St. P. & P. R. Co., supra; United States* v. *Willow River Co., supra.* I would complete the process and allow the United States the full use of its dominant servitude in a navigable stream.

I am indebted to the late Mr. Justice Rutledge for much of the phraseology and content of this dissent.

MR. JUSTICE MINTON, dissenting.

I agree with all that MR. JUSTICE DOUGLAS says in his dissent, but I would for an additional reason reverse this case. The waters interfered with here were surface and percolating or subsurface waters. Respondent had always enjoyed the economic advantage of having its surface and subsurface water drain into Dardenne Creek. The raising of the water level in the Mississippi has interfered with this advantage. But surface and subsurface waters are outlaws in Missouri, as at common law, and anyone may defend against them and interfere with their natural drainage.[1] No right exists under Missouri law to have surface or subsurface water flow naturally onto adjoining land. Landowners may build embankments, dykes, or other obstructions to stop the flow of surface water upon their land. Although it appears that under Missouri law a riparian owner may not dam a watercourse so that it is obstructed or the lands of another are flooded,[2] no authority has been brought to my attention

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[1] See, *e. g., Goll* v. *Railroad,* 271 Mo. 655, 197 S. W. 244; *Johnson* v. *Leazenby,* 202 Mo. App. 232, 216 S. W. 49; *Mehonray* v. *Foster,* 132 Mo. App. 229, 111 S. W. 882; *Applegate* v. *Franklin,* 109 Mo. App. 293, 84 S. W. 347; *Gottenstroeter* v. *Kappelmann* [reported as *Gottenetroeter* v. *Kapplemann* and *Gottenetroeter* v. *Kappleman*], 83 Mo. App. 290; *Collier* v. *Chicago & A. R. Co.,* 48 Mo. App. 398.

[2] See *Keener* v. *Sharp,* 341 Mo. 1192, 111 S. W. 2d 118; *Greisinger* v. *Klinhardt,* 321 Mo. 186, 9 S. W. 2d 978; *Waterworks Co.* v. *Jenkins,* 62 Mo. App. 74.

which would indicate that the obstruction of drainage by raising the water level of a stream confers a cause of action. I had not supposed that just compensation requires the Government to pay for that which a riparian owner may freely do under state law. The Government, by interfering with the drainage into Dardenne Creek, is not "taking" any "right" of respondent.

> ". . . not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." *United States* v. *Willow River Co.*, 324 U. S. 499, 502.

Since the United States may with impunity cause land lying within the bed of the stream to be overflowed as a superior right to control navigation, and since respondent has no right to the unhampered drainage of surface and subsurface water, it follows that the Government has taken no right of respondent. Therefore it is not bound to pay compensation. It would be anomalous indeed that while the Government may flood lands lying between high- and low-water marks without paying compensation, it is liable for an interference with drainage of surface water by raising the water level to high-water mark. I would reverse the judgment.

HENDERSON *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

No. 25. Argued April 3, 1950.—Decided June 5, 1950.

Under the rules of an interstate railroad, dining cars are divided so as to allot ten tables exclusively to white passengers and one table exclusively to Negro passengers, and a curtain separates the table reserved for Negroes from the others. Under these rules, only four Negro passengers may be served at one time and then only at the table reserved for Negroes. Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere in the diner. The rules impose a like deprivation upon white passengers whenever more than 40 of them seek to be served at the same time and the table reserved for Negroes is vacant. *Held:* These rules and practices violate § 3 (1) of the Interstate Commerce Act, which makes it unlawful for a railroad in interstate commerce "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Pp. 818–826.

(a) Having been subjected to the railroad's earlier practices which the Interstate Commerce Commission and the court below found violative of the Interstate Commerce Act, appellant, a Negro, has standing to challenge the railroad's current regulations on the ground that they permit the recurrence of comparable violations. P. 823.

(b) The right to be free from unreasonable discriminations belongs, under § 3 (1), to each particular person. P. 824.

(c) The curtains, partitions and signs emphasizing the artificiality of a difference in treatment of passengers holding identical tickets and using the same public dining facility violate § 3 (1). P. 825.

(d) The limited demand for dining-car facilities by Negro passengers does not justify the regulations. P. 825.

(e) That the regulations may impose on white passengers, in proportion to their numbers, disadvantages similar to those imposed on Negro passengers does not validate them under § 3 (1). Pp. 825–826.

80 F. Supp. 32, reversed.

In a suit brought by appellant to set aside an order of the Interstate Commerce Commission, 269 I. C. C. 73, the three-judge District Court dismissed the complaint. 80 F. Supp. 32. On direct appeal to this Court, *reversed and remanded,* p. 826.

Belford V. Lawson, Jr. and *Jawn Sandifer* argued the cause for appellant. With them on the brief were *Marjorie M. McKenzie, Sidney A. Jones, Jr., Earl B. Dickerson, Josiah F. Henry, Jr., Theodore M. Berry* and *George H. Windsor.*

Attorney General McGrath and *Solicitor General Perlman* argued the cause for the United States, appellee, urging reversal. With *Mr. Perlman* on the brief were *Assistant Attorney General Bergson, Charles H. Weston* and *Philip Elman.*

Allen Crenshaw argued the cause for the Interstate Commerce Commission, appellee, urging affirmance. With him on the brief was *Daniel W. Knowlton.*

Charles Clark argued the cause for the Southern Railway Co., appellee. With him on the brief were *Sidney S. Alderman* and *Arthur J. Dixon.*

By special leave of Court, *The Honorable Sam Hobbs,* a member of the Committee on the Judiciary of the House of Representatives, argued the cause and filed a brief, as *amicus curiae,* urging affirmance.

Briefs of *amici curiae,* supporting appellant, were filed by *Robert J. Silberstein, Mozart G. Ratner* and *Ruth Weyand* for the National Lawyers Guild; *Phineas Indritz* for the American Veterans Committee, Inc.; *Arthur J. Goldberg* for the Congress of Industrial Organizations; *Will Maslow, Shad Polier* and *Joseph B. Robison* for the American Jewish Congress; *Robert L. Carter* and

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Thurgood Marshall for the National Association for the Advancement of Colored People; and *Joseph R. Booker, Richard E. Westbrooks, Lucia T. Thomas, William A. Booker, Georgia Jones Ellis, Earl B. Dickerson* and *Joseph E. Clayton, Jr.* for the Civil Rights Committee of the National Bar Association.

MR. JUSTICE BURTON delivered the opinion of the Court.

The question here is whether the rules and practices of the Southern Railway Company, which divide each dining car so as to allot ten tables exclusively to white passengers and one table exclusively to Negro passengers, and which call for a curtain or partition between that table and the others, violate § 3 (1) of the Interstate Commerce Act. That section makes it unlawful for a railroad in interstate commerce "to subject any particular person, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . . ." 54 Stat. 902, 49 U. S. C. § 3 (1). We hold that those rules and practices do violate the Act.

This issue grows out of an incident which occurred May 17, 1942. On that date the appellant, Elmer W. Henderson, a Negro passenger, was traveling on a first-class ticket on the Southern Railway from Washington, D. C., to Atlanta, Georgia, en route to Birmingham, Alabama, in the course of his duties as an employee of the United States. The train left Washington at 2 p. m. At about 5:30 p. m., while the train was in Virginia,[1] the first call to dinner was announced and he went promptly to the dining car. In accordance with the practice then in effect, the two end tables nearest the kitchen were conditionally reserved for Negroes. At each meal those tables were to be reserved initially for Negroes and, when oc-

[1] No reliance is placed in this case upon any action by any state.

cupied by Negroes, curtains were to be drawn between them and the rest of the car. If the other tables were occupied before any Negro passengers presented themselves at the diner then those two tables also were to be available for white passengers, and Negroes were not to be seated at them while in use by white passengers.[2] When the appellant reached the diner, the end tables in question were partly occupied by white passengers but at least one seat at them was unoccupied. The dining-car steward declined to seat the appellant in the dining car but offered to serve him, without additional charge, at

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[2] Rule of the Southern Railway Company issued July 3, 1941, and in effect May 17, 1942:

"DINING CAR REGULATIONS

"Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them." 258 I. C. C. 413, 415, 63 F. Supp. 906, 910.

Joint Circular of the Southern Railway System issued August 6, 1942:

"Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

"Before starting each meal pull the curtains to service position and place a 'Reserved' card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

"After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

" 'Reserved' cards are being supplied you." 258 I. C. C. at p. 415, 63 F. Supp. at p. 910.

his Pullman seat. The appellant declined that offer and the steward agreed to send him word when space was available. No word was sent and the appellant was not served, although he twice returned to the diner before it was detached at 9 p. m.

In October, 1942, the appellant filed a complaint with the Interstate Commerce Commission alleging especially that the foregoing conduct violated § 3 (1) of the Interstate Commerce Act.[3] Division 2 of the Commission found that he had been subjected to undue and unreasonable prejudice and disadvantage, but that the occurrence was a casual incident brought about by the bad judgment of an employee. The Commission declined to enter an order as to future practices. 258 I. C. C. 413. A three-judge United States District Court for the District of Maryland, however, held that the railroad's general practice, as evidenced by its instructions of August 6, 1942, was in violation of § 3 (1). Ac-

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[3] "(1) *It shall be unlawful for any common carrier* subject to the provisions of this part *to make, give, or cause any undue or unreasonable preference or advantage to any particular person,* company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, *in any respect whatsoever; or to subject any particular person,* company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic *to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . . .*" (Emphasis supplied.) 54 Stat. 902, 49 U. S. C. § 3 (1).

The appellant sought an order directing the railroad not only to cease and desist from the specific violations alleged but also to establish in the future, for the complainant and other Negro interstate passengers, equal and just dining-car facilities and such other service and facilities as the Commission might consider reasonable and just, and requiring the railroad to discontinue using curtains around tables reserved for Negroes.

The appellant sought damages, but the Commission found no pecuniary damages and that issue has not been pressed further.

cordingly, on February 18, 1946, it remanded the case for further proceedings. 63 F. Supp. 906. Effective March 1, 1946, the company announced its modified rules which are now in effect. They provide for the reservation of ten tables, of four seats each, exclusively and unconditionally for white passengers and one table, of four seats, exclusively and unconditionally for Negro passengers. Between this table and the others a curtain is drawn during each meal.[4]

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[4] "TRANSPORTATION DEPARTMENT CIRCULAR NO. 142. CANCELLING INSTRUCTIONS ON THIS SUBJECT DATED JULY 3, 1941, AND AUGUST 6, 1942.

"SUBJECT: SEGREGATION OF WHITE AND COLORED PASSENGERS IN DINING CARS.

"To: Passenger Conductors and Dining Car Stewards.

"Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

"(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

"(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

"(3) A 'Reserved' card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

"(4) These rules become effective March 1, 1946.

"R. K. McClain,
"Assistant Vice-President."

269 I. C. C. 73, 75, 80 F. Supp. 32, 35.

Counsel for the railway company, at a subsequent hearing, corrected the above rules "to the extent of using the word 'negroes' in the place of 'colored persons.'" Also, the evidence shows, and the Commission

On remand, the full Commission, with two members dissenting and one not participating, found that the modified rules do not violate the Interstate Commerce Act and that no order for the future was necessary.[5] 269 I. C. C. 73. The appellant promptly instituted the present proceeding before the District Court, constituted of the same three members as before, seeking to have the Commission's order set aside and a cease and desist order issued. 28 U. S. C. §§ 41 (28), 43–48; 49 U. S. C. § 17 (9); see also, 28 U. S. C. (Supp. III) §§ 1336, 1398, 2284, 2321, 2325. With one member dissenting, the court sustained the modified rules on the ground that the accommodations are adequate to serve the average number of Negro passengers and are "proportionately fair." 80 F. Supp. 32, 39. The case is here on direct appeal. 28 U. S. C. (Supp. III) §§ 1253, 2101 (b). In this Court, the

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has stated, that "White and Negro soldiers are served together, without distinction." 258 I. C. C. 413, 415, 63 F. Supp. 906, 910. The rules, accordingly, are treated as applicable only to civilian passengers. The company further showed that it is now substituting a five-foot high wooden partition in place of the curtain. The steward's office is being placed in the table space opposite that reserved for Negro passengers and a similar wooden partition is being erected between that office and the rest of the car.

[5] The company was permitted to introduce two tabulations, covering about ten days each, showing the comparative numbers of meals served to white and Negro passengers on trips comparable to the one which the appellant had taken. These show that only about 4% of the total meals served were served to Negro passengers whereas four reserved seats exceed 9% of a total seating capacity of 44. On the other hand, the tabulations also show that at one meal 17 Negro passengers, and at each of 20 meals more than eight Negro passengers, were served. Similarly, the brief filed by the Commission states that, out of the 639 serving periods reported, on 15 occasions more than four times as many white passengers were served as there were seats reserved for them, and, on 541 occasions, there were two or more rounds of servings.

United States filed a brief and argued orally in support of the appellant.

It is clear that appellant has standing to bring these proceedings. He is an aggrieved party, free to travel again on the Southern Railway. Having been subjected to practices of the railroad which the Commission and the court below found to violate the Interstate Commerce Act, he may challenge the railroad's current regulations on the ground that they permit the recurrence of comparable violations. *Mitchell* v. *United States,* 313 U. S. 80, 92–93.

The material language in § 3 (1) of the Interstate Commerce Act has been in that statute since its adoption in 1887. 24 Stat. 380. From the beginning, the Interstate Commerce Commission has recognized the application of that language to discriminations between white and Negro passengers. *Councill* v. *Western & Atlantic R. Co.,* 1 I. C. C. 339; [6] *Heard* v. *Georgia R. Co.,* 1 I. C. C. 428; *Heard* v. *Georgia R. Co.,* 3 I. C. C. 111; *Edwards* v. *Nashville, C. & St. L. R. Co.,* 12 I. C. C. 247; *Cozart* v. *Southern R. Co.,* 16 I. C. C. 226; *Gaines* v. *Seaboard Air Line R. Co.,* 16 I. C. C. 471; *Crosby* v. *St. Louis-San Francisco R. Co.,* 112 I. C. C. 239. That section recently was so applied in *Mitchell* v. *United States, supra.*

The decision of this case is largely controlled by that in the *Mitchell* case. There a Negro passenger holding a first-class ticket was denied a Pullman seat, although such a seat was unoccupied and would have been avail-

[6] "The Western and Atlantic Railroad Company will be notified to cease and desist from subjecting colored persons to undue and unreasonable prejudice and disadvantage in violation of section 3 of the Act to regulate commerce, and from furnishing to colored persons purchasing first-class tickets on its road accommodations which are not equally safe and comfortable with those furnished other first-class passengers." 1 I. C. C. at p. 347.

able to him if he had been white. The railroad rules had allotted a limited amount of Pullman space, consisting of compartments and drawing rooms, to Negro passengers and, because that space was occupied, the complainant was excluded from the Pullman car and required to ride in a second-class coach. This Court held that the passenger thereby had been subjected to an unreasonable disadvantage in violation of § 3 (1).[7]

The similarity between that case and this is inescapable. The appellant here was denied a seat in the dining car although at least one seat was vacant and would have been available to him, under the existing rules, if he had been white.[8] The issue before us, as in the *Mitchell* case, is whether the railroad's current rules and practices cause passengers to be subjected to undue or unreasonable prejudice or disadvantage in violation of § 3 (1). We find that they do.

The right to be free from unreasonable discriminations belongs, under § 3 (1), to each particular person. Where a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations. The denial of dining service to any such passenger by the rules before us subjects him to a prohibited disadvantage. Under the rules, only four Negro passengers may be served at one time and then only at the table reserved for Negroes. Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere

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[7] The rules also denied access by Negroes to the dining car and observation car. The principles there announced applied equally to those facilities.

[8] That specific denial of service was condemned by the Commission and the District Court as a violation of § 3 (1). Review of that condemnation is not sought here.

in the diner. The railroad thus refuses to extend to those passengers the use of its existing and unoccupied facilities. The rules impose a like deprivation upon white passengers whenever more than 40 of them seek to be served at the same time and the table reserved for Negroes is vacant.

We need not multiply instances in which these rules sanction unreasonable discriminations. The curtains, partitions and signs emphasize the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility. Cf. *McLaurin* v. *Oklahoma State Regents*, *ante*, p. 637, decided today. They violate § 3 (1).

Our attention has been directed to nothing which removes these racial allocations from the statutory condemnation of "undue or unreasonable prejudice or disadvantage . . . ." It is argued that the limited demand for dining-car facilities by Negro passengers justifies the regulations. But it is no answer to the particular passenger who is denied service at an unoccupied place in a dining car that, on the average, persons like him are served. As was pointed out in *Mitchell* v. *United States*, 313 U. S. 80, 97, "the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act." Cf. *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337.

That the regulations may impose on white passengers, in proportion to their numbers, disadvantages similar to those imposed on Negro passengers is not an answer to the requirements of § 3 (1). Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader

than if only one were affected. Cf. *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

Since § 3 (1) of the Interstate Commerce Act invalidates the rules and practices before us, we do not reach the constitutional or other issues suggested.

The judgment of the District Court is reversed and the cause is remanded to that court with directions to set aside the order of the Interstate Commerce Commission which dismissed the original complaint and to remand the case to that Commission for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice Douglas concurs in the result.

Mr. Justice Clark took no part in the consideration or decision of this case.

AUTOMATIC RADIO MANUFACTURING CO., INC. *v.* HAZELTINE RESEARCH, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 455. Argued April 5, 1950.—Decided June 5, 1950.

Petitioner, a manufacturer of radio broadcasting receivers, entered into a licensing agreement with respondent, a radio research organization, whereby, for royalties amounting to a small percentage of petitioner's selling price of complete radio broadcasting receivers, petitioner obtained permission to use in the manufacture of its "home products" any or all of 570 patents which respondent held and any others to which it might acquire rights. Respondent is not a manufacturer but derives its income from licensing its patents; and its policy is to license any and all responsible manufacturers. Under the agreement, petitioner was not obligated to use any of respondent's patents in the manufacture of its products; but it was required to pay the royalty, whether it used them or not. *Held:*

1. It is not *per se* a misuse of patents to require the licensee to pay royalties based on a percentage of its sales, even though none of the patents is used. Pp. 830–834.

(a) On the record in this case, there was nothing to support petitioner's averment that respondent refused to grant a license under any one or more of its patents to anyone who refused to take a license under all, since the affidavit in support thereof was made upon information and belief and the relevant portion did not comply with Rule 56 (e) of the Federal Rules of Civil Procedure. P. 831.

(b) There is no indication in this case of a conspiracy to restrict production of unpatented goods, or any goods, to effectuate a monopoly. *United States* v. *Gypsum Co.*, 333 U. S. 364, distinguished. P. 832.

(c) In this case, the royalty provision did not create another monopoly and created no restraint of competition beyond the legitimate grant of the patent. P. 833.

(d) The mere accumulation of patents, no matter how many, is not *per se* illegal. P. 834.

(e) In the circumstances of this case, there being no inherent extension of the monopoly of the patents, payment of royalties according to an agreed percentage of the licensee's sales is not unreasonable. P. 834.

(f) Having obtained by the agreement the privilege of using any or all of respondent's patents and developments, petitioner cannot complain because it must pay royalties whether it uses the patents or not. P. 834.

2. The question whether the inclusion in the licensing agreement of a provision requiring petitioner to attach restrictive notices to the apparatus manufactured by it made the agreement unenforceable is moot, because respondent had waived compliance with this requirement. Pp. 834–836.

3. There being no showing that the licensing agreement or the practices under it were a misuse of patents or contrary to public policy, petitioner may not, in this suit, challenge the validity of the licensed patents. P. 836.

176 F. 2d 799, affirmed.

In a suit by the licensor of certain patents, the District Court sustained the validity of a patent licensing agreement, entered judgment for an accounting and recovery of royalties, and enjoined petitioner from failing to pay royalties, to keep records and to render reports during the life of the agreement. 77 F. Supp. 493. The Court of Appeals affirmed. 176 F. 2d 799. This Court granted certiorari. 338 U. S. 942. *Affirmed,* p. 836.

Floyd H. Crews argued the cause for petitioner. With him on the brief were *George K. Woodworth* and *Morris Relson.*

Philip F. LaFollette and *Laurence B. Dodds* argued the cause for respondent. With them on the brief were *Miles D. Pillars* and *Leonard A. Watson.*

Solicitor General Perlman, Assistant Attorney General Bergson, John C. Stedman, Wilbur L. Fugate and *J. Roger Wollenberg* filed a brief for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE MINTON delivered the opinion of the Court.

This is a suit by respondent Hazeltine Research, Inc., as assignee of the licensor's interest in a nonexclusive patent license agreement covering a group of 570 patents and 200 applications, against petitioner Automatic Radio Manufacturing Company, Inc., the licensee, to recover royalties. The patents and applications are related to the manufacture of radio broadcasting apparatus. Respondent and its corporate affiliate and predecessor have for some twenty years been engaged in research, development, engineering design and testing and consulting services in the radio field. Respondent derives income from the licensing of its patents, its policy being to license any and all responsible manufacturers of radio apparatus at a royalty rate which for many years has been approximately one percent. Petitioner manufactures radio apparatus, particularly radio broadcasting receivers.

The license agreement in issue, which appears to be a standard Hazeltine license, was entered into by the parties in September 1942, for a term of ten years. By its terms petitioner acquired permission to use, in the manufacture of its "home" products, any or all of the patents which respondent held or to which it might acquire rights. Petitioner was not, however, obligated to use respondent's patents in the manufacture of its products. For this license, petitioner agreed to pay respondent's assignor royalties based upon a small percentage of petitioner's selling price of complete radio broadcasting receivers, and in any event a minimum of $10,000 per year. It further agreed to keep a record of its sales and to make monthly reports thereof.

This suit was brought to recover the minimum royalty due for the year ending August 31, 1946, for an accounting of other sums due, and for other relief. Petitioner answered and both parties filed motions for summary

judgment and affidavits in support of the motions. The District Court found the case to be one appropriate for summary procedure under Rule 56 of the Federal Rules of Civil Procedure, and sustained the motion of respondent for judgment. The validity of the license agreement was upheld against various charges of misuse of the patents, and judgment was entered for the recovery of royalties and an accounting, and for a permanent injunction restraining petitioner from failing to pay royalties, to keep records, and to render reports during the life of the agreement. 77 F. Supp. 493. The Court of Appeals affirmed, one judge dissenting (176 F. 2d 799), and we granted certiorari (338 U. S. 942) in order to consider important questions concerning patent misuse and estoppel to challenge the validity of licensed patents.

The questions for determination are whether a misuse of patents has been shown, and whether petitioner may contest the validity of the licensed patents, in order to avoid its obligation to pay royalties under the agreement.

First. It is insisted that the license agreement cannot be enforced because it is a misuse of patents to require the licensee to pay royalties based on its sales, even though none of the patents are used. Petitioner directs our attention to the "Tie-in" cases. These cases have condemned schemes requiring the purchase of unpatented goods for use with patented apparatus or processes,[1] pro-

[1] *International Salt Co.* v. *United States,* 332 U. S. 392; *Mercoid Corp.* v. *Minneapolis-Honeywell Co.,* 320 U. S. 680; *Mercoid Corp.* v. *Mid-Continent Investment Co.,* 320 U. S. 661; *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495; *Morton Salt Co.* v. *Suppiger Co.,* 314 U. S. 488; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436; *Leitch Manufacturing Co.* v. *Barber Co.,* 302 U. S. 458; *International Business Machines Corp.* v. *United States,* 298 U. S. 131; *Carbice Corp.* v. *American Patents Development Corp.,* 283 U. S. 27; *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451; *Motion Picture Patents Co.* v. *Universal Film Manufacturing Co.,* 243 U. S. 502.

hibiting production or sale of competing goods,[2] and conditioning the granting of a license under one patent upon the acceptance of another and different license.[3] Petitioner apparently concedes that these cases do not, on their facts, control the instant situation. It is obvious that they do not. There is present here no requirement for the purchase of any goods. Hazeltine does not even manufacture or sell goods; it is engaged solely in research activities. Nor is there any prohibition as to the licensee's manufacture or sale of any type of apparatus. The fact that the license agreement covers only "home" apparatus does not mean that the licensee is prohibited from manufacturing or selling other apparatus. And finally, there is no conditioning of the license grant upon the acceptance of another and different license. We are aware that petitioner asserted in its countermotion for summary judgment in the District Court that Hazeltine refused to grant a license under any one or more of its patents to anyone who refused to take a license under all. This averment was elaborated in the affidavit of petitioner's attorney in support of the motion. The point was not pressed in the Court of Appeals or here. In any event there is nothing available in the record to support the averment, since the affidavit in support thereof was made upon information and belief and the relevant portion, at least, does not comply with Rule 56 (e) of the Federal Rules of Civil Procedure.[4]

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[2] *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451; *National Lockwasher Co.* v. *Garrett Co.,* 137 F. 2d 255; *Radio Corp.* v. *Lord,* 28 F. 2d 257.

[3] *United States* v. *Paramount Pictures,* 334 U. S. 131. (Copyright "block-booking.")

[4] "Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ." Fed. Rules Civ. Proc., 56 (e).

But petitioner urges that this case "is identical in principle" with the "Tie-in" cases. It is contended that the licensing provision requiring royalty payments of a percentage of the sales of the licensee's products constitutes a misuse of patents because it ties in a payment on unpatented goods. Particular reliance is placed on language from *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 389, 400.[5] That case was a prosecution under the Sherman Act for an alleged conspiracy of Gypsum and its licensees to extend the monopoly of certain patents and to eliminate competition by fixing prices on patented and unpatented gypsum board. The license provisions based royalties on all sales of gypsum board, both patented and unpatented. It was held that the license provisions, together with evidence of an understanding that only patented board would be sold, showed a conspiracy to restrict the production of unpatented products which was an invalid extension of the area of the patent monopoly. 333 U. S. at 397. There is no indication here of conspiracy to restrict production of unpatented or any goods to effectuate a monopoly, and thus the *Gypsum* case does not aid petitioner. That which is condemned as against public policy by the "Tie-in" cases is the extension of the monopoly of the patent to create another monopoly or restraint of competition—a restraint not countenanced by the patent grant. See, *e. g.*, *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 665–666; *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 456. The principle of those cases cannot be contorted to circumscribe the

[5] ". . . the royalty was to be measured by a percentage of the value of all gypsum products, patented or unpatented . . . ." 333 U. S. at 389. "Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution." 333 U. S. at 400.

instant situation. This royalty provision does not create another monopoly; it creates no restraint of competition beyond the legitimate grant of the patent. The right to a patent includes the right to market the use of the patent at a reasonable return. See 46 Stat. 376, 35 U. S. C. § 40; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 417, 324 U. S. 570, 574.

The licensing agreement in issue was characterized by the District Court as essentially a grant by Hazeltine to petitioner of a privilege to use any patent or future development of Hazeltine in consideration of the payment of royalties. Payment for the privilege is required regardless of use of the patents.[6] The royalty provision of the licensing agreement was sustained by the District Court and the Court of Appeals on the theory that it was a convenient mode of operation designed by the parties to avoid the necessity of determining whether each type of petitioner's product embodies any of the numerous Hazeltine patents. 77 F. Supp. at 496. The Court of Appeals reasoned that since it would not be unlawful to agree to pay a fixed sum for the privilege to use patents, it was not unlawful to provide a variable consideration measured by a percentage of the licensee's sales for the same privilege. 176 F. 2d at 804. Numerous District Courts which have had occasion to pass on the question have reached the same result on similar grounds,[7] and we are of like opinion.

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[6] In this view of the contract we need not concern ourselves with the controversy between counsel as to whether the transcript shows a factual dispute over the use or non-use of Hazeltine patents by petitioner in its products.

[7] *Hazeltine Research* v. *Admiral Corp.,* 87 F. Supp. 72, 79; *H-P-M Development Corp.* v. *Watson-Stillman Co.,* 71 F. Supp. 906, 912; *American Optical Co.* v. *New Jersey Optical Co.,* 58 F. Supp. 601, 606; *Ohio Citizens Trust Co.* v. *Air-Way Electric Appliance Corp.,* 56 F. Supp. 1010, 1012; Cf. *Pyrene Mfg. Co.* v. *Urquhart,* 69 F. Supp. 555, 560; *International Carbonic Engineering Co.* v. *Natural Car-*

The mere accumulation of patents, no matter how many, is not in and of itself illegal. See *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637. And this record simply does not support incendiary, yet vague, charges that respondent uses its accumulation of patents "for the exaction of tribute" and collects royalties "by means of the overpowering threat of disastrous litigation." We cannot say that payment of royalties according to an agreed percentage of the licensee's sales is unreasonable. Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. We are not unmindful that convenience cannot justify an extension of the monopoly of the patent. See, *e. g.*, *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 666; *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 498. But as we have already indicated, there is in this royalty provision no inherent extension of the monopoly of the patent. Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them. If it chooses to use none of them, it has nevertheless contracted to pay for the privilege of using existing patents plus any developments resulting from respondent's continuous research. We hold that in licensing the use of patents to one engaged in a related enterprise, it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales.

Second. It is next contended by petitioner that the license agreement is unenforceable because it contained a provision requiring the following restrictive notice to be

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bonic Products, 57 F. Supp. 248, 251–253, affirmed, 158 F. 2d 285. At least one state court has reached this result. *Hazeltine Research* v. *De Wald Radio Corp.*, 84 N. Y. S. 2d 597, 603.

attached to apparatus manufactured by petitioner under the agreement:

> " 'Licensed by Hazeltine Corporation only for use in homes, for educational purposes, and for private, non-commercial use, under one or more of the following patents and under pending applications:' followed by the word 'Patent' and the numbers of the patents which are, in the opinion of Licensor, involved in apparatus of the types licensed hereunder manufactured by one or more licensees of Licensor."

Respondent did not seek to have this provision of the agreement enforced, and the decree of the District Court does not enforce it. It may well have been a dead letter from the beginning, as indicated by the fact that, as petitioner averred in its answer, it has never observed this provision of the agreement. Thus it is doubtful that the legality of this provision could be contested, even assuming that the issue was properly raised, which respondent disputes. In any event, it is clear that any issue with respect to this provision of the agreement is moot. An affidavit of the president of respondent corporation advises us of certain letters which were sent by respondent in September 1945, to each of its licensees, including petitioner. These letters authorized the discontinuance of the restrictive notice provision and the substitution of the marking

> "This apparatus is licensed under the United States patent rights of HAZELTINE CORPORATION."

It is further averred that this form of notice is all that respondent has required of its licensees since September 1945. Since this provision of the agreement was made for the benefit of respondent, it could voluntarily waive the provision. *Westinghouse Electric Corp.* v. *Bulldog Electric Products Co.*, 179 F. 2d 139, 145, 146. Thus the question of the legality of the original restrictive notice

provision is not before us. Cf. *Standard Oil Co.* v. *United States,* 283 U. S. 163, 181–182.

Third. Finally, it is contended that notwithstanding the licensing agreement, petitioner-licensee may contest the validity of the patents it is charged with using. The general rule is that the licensee under a patent license agreement may not challenge the validity of the licensed patent in a suit for royalties due under the contract. *United States* v. *Harvey Steel Co.,* 196 U. S. 310. The general principle of the invalidity of price-fixing agreements may be invoked by the licensee of what purport to be valid patents to show in a suit for royalties that the patents are invalid. *Katzinger Co.* v. *Chicago Metallic Mfg. Co.,* 329 U. S. 394; *MacGregor* v. *Westinghouse Elec. & Mfg. Co.,* 329 U. S. 402. There is no showing that the licensing agreement here or the practices under it were a misuse of patents or contrary to public policy. This limited license for "home" use production contains neither an express nor implied agreement to refrain from production for "commercial" or any other use as part consideration for the license grant. The *Katzinger* and *MacGregor* cases are inapplicable. The general rule applies, and petitioner may not, in this suit, challenge the validity of the licensed patents.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

We are, I think, inclined to forget that the power of Congress to grant patents is circumscribed by the Constitution. The patent power, of all legislative powers, is indeed the only one whose purpose is defined. Article

I, § 8 describes the power as one "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This statement of policy limits the power itself.

The Court in its long history has at times been more alive to that policy than at other times. During the last three decades it has been as devoted to it (if not more so) than at any time in its history. I think that was due in large measure to the influence of Mr. Justice Brandeis and Chief Justice Stone. They were alert to the danger that business—growing bigger and bigger each decade—would fasten its hold more tightly on the economy through the cheap spawning of patents and would use one monopoly to beget another through the leverage of key patents. They followed in the early tradition of those who read the Constitution to mean that the public interest in patents comes first, reward to the inventor second.[1]

First. Mr. Justice Brandeis and Chief Justice Stone did not fashion but they made more secure one important rule designed to curb the use of patents. It is as follows: One who holds a patent on article A may not license the use of the patent on condition that B, an unpatented article, be bought.[2] Such a contract or agreement would be an extension of the grant of the patent contrary to a long line of decisions. See *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, 491–92; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277, 278; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 666;

[1] See Mr. Justice Story in *Pennock* v. *Dialogue*, 2 Pet. 1; Mr. Justice Daniel in *Kendall* v. *Winsor*, 21 How. 322; Mr. Justice Campbell in *Winans* v. *Denmead*, 15 How. 330, 344 (dissenting opinion).

[2] See Hamilton, Patents and Free Enterprise, T. N. E. C. Monograph No. 31, 76th Cong., 3d Sess., pp. 62–70.

United States v. *Gypsum Co.*, 333 U. S. 364, 389. For it would sweep under the patent an article that is unpatented or unpatentable. Each patent owner would become his own patent office and, by reason of the leverage of the patent, obtain a larger monopoly of the market than the Constitution or statutes permit.[3]

That is what is done here. Hazeltine licensed Automatic Radio to use 570 patents and 200 patent applications. Of these Automatic used at most 10. Automatic Radio was obligated, however, to pay as royalty a percentage of its total sales in certain lines without regard to whether or not the products sold were patented or unpatented. The inevitable result is that the patentee received royalties on unpatented products as part of the price for the use of the patents.

The patent owner has therefore used the patents to bludgeon his way into a partnership with this licensee, collecting royalties on unpatented as well as patented articles.

A plainer extension of a patent by unlawful means would be hard to imagine.

Second. Chief Justice Stone wrote for the Court in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, hold-

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[3] Mr. Justice Brandeis speaking for the Court in *Carbice Corp.* v. *American Patents Corp.*, *supra*, p. 32, said, "If a monopoly could be so expanded, the owner of a patent for a product might conceivably monopolize the commerce in a large part of unpatented materials used in its manufacture. The owner of a patent for a machine might thereby secure a partial monopoly on the unpatented supplies consumed in its operation. The owner of a patent for a process might secure a partial monopoly on the unpatented material employed in it. The owner of the patent in suit might conceivably secure a limited monopoly for the supplying not only of solid carbon dioxide, but also of the ice cream and other foods, as well as of the cartons in which they are shipped. The attempt to limit the licensee to the use of unpatented materials purchased from the licensor is comparable to the attempt of a patentee to fix the price at which the patented article may be resold."

ing that a licensee is not estopped to challenge a price-fixing clause by showing the patent is invalid. And see *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402. He also wrote for the Court in *Scott Paper Co.* v. *Marcalus Co.*, 326 U. S. 249, holding that estoppel did not bar the assignor of a patent from defending a suit for infringement of the assigned patent on the ground that the alleged infringing device was that of a prior-art expired patent.[4]

These decisions put the protection of the public interest in free enterprise above reward to the patentee. The limitations which they made on the estoppel doctrine represented an almost complete cycle back to the salutary teaching of *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 234, that, "It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly." To estop the licensee from attacking the validity of patents is to forget that "It is the public interest which is dominant in the patent system." *Mercoid Corp.* v. *Mid-Continent Investment Co.*, *supra*, at 665.

It is said that if the purpose was to enlarge the monopoly of the patent—for example, through price fixing—then estoppel would not bar the licensee from challenging the validity of the patents. But what worse enlargement of monopoly is there than the attachment of a patent to an unpatentable article? When we consider the constitutional standard, what greater public harm than that is there in the patent system?

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[4] In this case Chief Justice Stone emphasized the public interest at stake in allowing the challenge to the patent (326 U. S. p. 256): "By the force of the patent laws not only is the invention of a patent dedicated to the public upon its expiration, but the public thereby becomes entitled to share in the good will which the patentee has built up in the patented article or product through the enjoyment of his patent monopoly."

It is only right and just that the licensee be allowed to challenge the validity of the patents. A great pooling of patents is made; and whole industries are knit together in the fashion of the unholy alliances revealed in *United States* v. *Line Material Co.*, 333 U. S. 287, and *United States* v. *Gypsum Co.*, 333 U. S. 364. One who wants the use of one patent may have to take hundreds. The whole package may contain many patents that have been foisted on the public. No other person than the licensee will be interested enough to challenge them. He alone will be apt to see and understand the basis of their illegality.

The licensee protects the public interest in exposing invalid or expired patents and freeing the public of their toll. He should be allowed that privilege. He would be allowed it were the public interest considered the dominant one. Ridding the public of stale or specious patents is one way of serving the end of the progress of science.

We depart from a great tradition in this field (and see *Graver Tank & Mfg. Co.* v. *Linde Air Products*, 339 U. S. 605) when we affirm this judgment.

LYON, SUPERINTENDENT OF BANKS, *v.* SINGER.

NO. 512. CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.*

Argued April 18–19, 1950.—Decided June 5, 1950.

1. In these suits to collect from a statutory bank liquidator claims allegedly entitled to preference under New York Banking Law § 606, arising from transactions with a Japanese corporation blocked under Executive Orders Nos. 8389 and 8832, this Court accepts the determination of the New York Court of Appeals that, under New York law, these claims arose from transactions in New York and were entitled to preference. Pp. 842–843.
2. Since the New York court conditioned enforcement of the claims upon licensing by the Alien Property Custodian, federal control over alien property remains undiminished. *Propper* v. *Clark*, 337 U. S. 472, distinguished. P. 842.
3. This Court agrees that, at the time the New York judgments were entered, no licenses had been issued to these claimants; and it affirms the judgments below. P. 843.

299 N. Y. 113, 139, 85 N. E. 2d 894, 906, affirmed.

Edward Feldman argued the cause for Lyon, Superintendent of Banks. With him on the briefs was *Daniel Gersen.*

Albert R. Connelly argued the cause for Singer. With him on the brief was *George S. Collins.*

Allen T. Klots argued the cause for Banque Mellie Iran. With him on the brief were *Peter H. Kaminer* and *Merrill E. Clark, Jr.*

By special leave of Court, *James L. Morrisson* argued the cause for the United States, as *amicus curiae,* supporting petitioner in Nos. 512 and 513, urging reversal or

*Together with No. 527, *Singer* v. *Yokohama Specie Bank, Ltd. et al.;* No. 513, *Lyon, Superintendent of Banks,* v. *Banque Mellie Iran;* and No. 528, *Banque Mellie Iran* v. *Lyon, Superintendent of Banks,* also on certiorari to the same court.

modification of the judgment in No. 512, and affirmance in No. 527. With him on the briefs were *Solicitor General Perlman* and *Harold I. Baynton.*

PER CURIAM.

Certiorari was granted in these cases to review federal issues respecting the administration of frozen alien property. 339 U. S. 902.

The cases arose from suits brought by claimants Singer and Banque Mellie Iran to collect from a statutory bank liquidator claims allegedly entitled to a preference under New York Banking Law § 606, arising from transactions with a Japanese corporation, blocked under Executive Orders Nos. 8389, 5 Fed. Reg. 1400; 8832, 6 Fed. Reg. 3715. The New York Court of Appeals held that the transactions gave rise to a preferred claim in the liquidation but that payment by the liquidator must await specific licensing by the Alien Property Custodian of the transactions underlying the claims. *Singer* v. *Yokohama Specie Bank, Ltd.,* 293 N. Y. 542, 58 N. E. 2d 726, 299 N. Y. 113, 85 N. E. 2d 894; *Banque Mellie Iran* v. *Yokohama Specie Bank, Ltd.,* 299 N. Y. 139, 85 N. E. 2d 906.

Those opposed to the judgments urge that, as a matter of federal law, the freezing order prevented the creation of any claim recognizable under § 606 of the New York Banking Law.

Oral argument and study of the record have convinced us that the judgments of the New York Court of Appeals are not inconsistent with the First War Powers Act of 1941, § 301, 55 Stat. 839, or the above Executive Orders. We accept the New York court's determination that under New York law these claims arose from transactions in New York and were entitled to a preference. Since the New York court conditioned enforcement of the claims upon licensing by the Alien Property Custodian, federal control over alien property remains undiminished. Our

decision in *Propper* v. *Clark,* 337 U. S. 472, does not require a contrary conclusion. There the liquidator claimed title to frozen assets adversely to the Custodian, and sought to deny the Custodian's paramount power to vest the alien property in the United States. No such result follows from the New York court's judgments in the present cases.

Since we further agree that, at the time the New York judgments were entered, no licenses had been issued to these claimants, we affirm the judgments below.

Affirmed.

MR. JUSTICE FRANKFURTER is of the opinion that since the federal question in Nos. 513 and 528 has been eliminated by the license granted by the Director, Office of Alien Property, no jurisdiction to review remains in this Court. Therefore, the writs of certiorari in these two cases should be dismissed.

ROBERTS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

No. 2, Misc. Argued March 31, 1950.—Decided June 5, 1950.

1. Whether one is a "citizen" for the purpose of *in forma pauperis* proceedings in the federal courts under 28 U. S. C. § 1915 is a question solely of federal law. Pp. 844–845.
2. Congress has not prescribed loss of citizenship for conviction of crimes other than desertion and treason. P. 845.
3. An order of a Federal District Court denying a motion for leave to proceed *in forma pauperis* is appealable to the Court of Appeals under 28 U. S. C. § 1291. P. 845.
4. Petitioner's motion in this Court for leave to file a petition for a writ of mandamus to the District Court is denied, because of the ambiguous state of the record in the case and the fact that denial of the motion will not prejudice further applications by petitioner for leave to proceed *in forma pauperis*. P. 845.

Motion denied.

Max Radin, acting under an assignment by the Court, argued the cause and filed a brief for petitioner.

No appearance for respondents.

PER CURIAM.

Petitioner, who is confined in a California state prison, sought to file a petition *in forma pauperis* for a writ of injunction in the District Court below. That court denied leave to proceed *in forma pauperis,* holding that petitioner was not entitled to the benefits of 28 U. S. C. § 1915 because he was no longer a "citizen" as required by that section. The District Court reached that decision in reliance on California Penal Code § 2600, which provides that one sentenced to imprisonment for a term

of years is deprived of his civil rights for the period of imprisonment. The decision of the District Court is in error. Citizenship for the purpose of *in forma pauperis* proceedings in the federal courts is solely a matter of federal law. Congress has not specified criminal convictions, except for desertion and treason, as grounds for loss of citizenship. 8 U. S. C. § 801.

Petitioner thereafter filed a motion in the Court of Appeals for the Ninth Circuit for allowance of an appeal from the order of the District Court. The denial by a District Judge of a motion to proceed *in forma pauperis* is an appealable order. 28 U. S. C. § 1291; see *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). The Court of Appeals, however, held that it had "no power to grant an application for allowance of an appeal," and dismissed the petition.

Finally, petitioner filed in this Court a motion for leave to file a petition for a writ of mandamus to the District Court. Mandamus is an extraordinary remedy, available only in rare cases. *Ex parte Collett,* 337 U. S. 55, 72 (1949), and cases there cited. Because of the ambiguous state of this record, and the fact that a denial of this motion will not prejudice petitioner in further attempts to proceed *in forma pauperis,* the motion must be denied.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

OSMAN ET AL. *v.* DOUDS, REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 12. Decided June 5, 1950.

Section 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 146, 29 U. S. C. § 159 (h), pertaining to "non-Communist" affidavits, is valid under the Federal Constitution. *American Communications Assn.* v. *Douds*, 339 U. S. 382. Pp. 846–847.
Affirmed.

In a suit brought by the appellants to enjoin the appellee from enforcing the provisions of § 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 146, 29 U. S. C. § 159 (h), a three-judge District Court dismissed the complaint on the merits. On direct appeal to this Court, *affirmed,* p. 848.

Victor Rabinowitz and *Samuel A. Neuberger* for appellants.

PER CURIAM.

This case was heretofore held for, and presents the same issues involved in, *American Communications Association* v. *Douds,* and *United Steelworkers of America* v. *Labor Board,* decided May 8, 1950, 339 U. S. 382. In these cases the Court upheld the constitutionality of § 9 (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 61 Stat. 136, 146, 29 U. S. C. (Supp. III) §§ 141, 159 (h), which provides:

> "No investigation shall be made by the [National Labor Relations] Board of any question affecting

commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under subsection (e) (1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

With regard to that part of the section which is concerned with membership in, or affiliation with, the Communist Party, the Court holds the requirement to be constitutional. MR. JUSTICE BLACK dissents for reasons stated in his dissent in *American Communications Association* v. *Douds, supra.*

With regard to the constitutionality of other relevant parts of the section, the Court is equally divided. MR. JUSTICE MINTON joins in the views expressed by THE CHIEF JUSTICE, who was joined by MR. JUSTICE REED and MR. JUSTICE BURTON in the cases above cited. MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON adhere to their opinions in those cases. MR. JUSTICE DOUGLAS joins the dissenting opinions of MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON insofar as they hold unconstitutional the

portion of the oath dealing with beliefs, and being of the view that provisions of the oath are not separable votes to reverse. He therefore does not find it necessary to reach the question of the constitutionality of the other part of the oath. The judgment of the District Court is therefore

Affirmed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers from 848 to 901 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

DECISIONS PER CURIAM AND ORDERS FROM FEBRUARY 20 THROUGH JUNE 5, 1950.

FEBRUARY 20, 1950.*

Per Curiam Decisions.

No. 373. COHNSTAEDT *v.* IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 338 U. S. 890, to the Supreme Court of Kansas. Argued February 7, 1950. Decided February 20, 1950. *Per Curiam:* The judgment is reversed. *Girouard* v. *United States,* 328 U. S. 61. THE CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE CLARK dissent. *Osmond K. Fraenkel* argued the cause and filed a brief for petitioner. *L. Paul Winings* argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Joseph W. Bishop, Jr.* and *Charles Gordon.* Reported below: 167 Kan. 451, 207 P. 2d 425.

No. 454. GEORGIA RAILROAD & BANKING CO. *v.* REDWINE, STATE REVENUE COMMISSIONER. Appeal from the United States District Court for the Northern District of Georgia. Argued February 13, 1950. Order entered February 20, 1950. *Per Curiam:* Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy, and efficient state remedies were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies. *Furman Smith* argued the cause for appellant. With him on the brief was *Robert B. Troutman. M. H. Blackshear, Jr.,* Assistant Attorney General of Georgia, argued the cause for appellee. With him on

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of the cases in which orders or judgments were this day announced.

the brief were *Eugene Cook*, Attorney General, and *Edward E. Dorsey*. *Victor Davidson* and *Standish Thompson* filed a brief for certain counties and municipalities of Georgia, as *amici curiae*, urging affirmance. Reported below: 85 F. Supp. 749.

Miscellaneous Orders.

No. 328, Misc. IN RE SCHAMUS. The motion for leave to file petition for writ of quo warranto is denied.

No. 329, Misc. KISSINGER *v.* HUNTER, WARDEN; and

No. 338, Misc. LANCOUR *v.* MICHIGAN. The motions for leave to file petitions for writs of habeas corpus are denied.

Certiorari Granted.

No. 512. BELL, SUPERINTENDENT OF BANKS, *v.* SINGER; and

No. 527. SINGER *v.* YOKOHAMA SPECIE BANK, LTD. ET AL. Court of Appeals of New York. Certiorari granted. *Edward Feldman* for Bell, petitioner in No. 512 and respondent in No. 527. *Albert R. Connelly* and *George S. Collins* for Singer. *Solicitor General Perlman* filed a memorandum in No. 512 for the United States, as *amicus curiae*, urging that the petition therein be granted. Reported below: 299 N. Y. 113, 85 N. E. 2d 894.

No. 513. BELL, SUPERINTENDENT OF BANKS, *v.* BANQUE MELLIE IRAN; and

No. 528. BANQUE MELLIE IRAN *v.* BELL, SUPERINTENDENT OF BANKS. Court of Appeals of New York. Certiorari granted. *Edward Feldman* for Bell. *Allen T. Klots* for Banque Mellie Iran. *Solicitor General Perlman* filed a memorandum in No. 513 for the United States, as *amicus curiae*, urging that the petition therein be granted. Reported below: 299 N. Y. 139, 85 N. E. 2d 906.

Certiorari Denied.

No. 498. WOMSLEY ET AL. *v.* PENNSYLVANIA RAILROAD CO. ET AL. C. A. 3d Cir. Certiorari denied. *Earl F. Reed* for petitioners. *James G. Johnson, Jr., Charles J. Margiotti, Charles F. C. Arensberg* and *John G. Buchanan* for respondents. Reported below: 176 F. 2d 937.

No. 500. STATE OF WASHINGTON *v.* COLUMBIA STEEL CO. Supreme Court of Washington. Certiorari denied. *Smith Troy,* Attorney General of Washington, and *C. John Newlands,* Assistant Attorney General, for petitioner. *Robert H. Evans, William G. McLaren* and *Walter Shelton* for respondent. Reported below: 34 Wash. 2d 700, 209 P. 2d 482.

No. 501. TAX COMMISSION OF THE STATE OF WASHINGTON ET AL. *v.* WEYERHAEUSER SALES CO. Supreme Court of Washington. Certiorari denied. *Smith Troy,* Attorney General of Washington, and *C. John Newlands,* Assistant Attorney General, for petitioners. *Chas. W. Briggs, J. Neil Morton* and *Thomas J. Hanify* for respondent. Reported below: 34 Wash. 2d 927, 209 P. 2d 490.

No. 509. BUTEAU *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. *Philip R. Pastore* for petitioner. *Abraham S. Ullman* and *Arthur T. Gorman* for respondent. Reported below: 136 Conn. 113, 68 A. 2d 681.

No. 516. WOOTON ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Seymour Krieger* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 114 Ct. Cl. 608, 86 F. Supp. 143.

No. 526. ELEAZER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *James F. Dreher* and *David W. Robin-*

son for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 177 F. 2d 914.

No. 529. PHILLIPS PETROLEUM CO. *v.* JONES, COLLECTOR OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Don Emery, Rayburn L. Foster, Harry D. Turner* and *Hilary D. Mahin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Joseph W. Bishop, Jr.* for respondent. Reported below: 176 F. 2d 737.

No. 532. UNITED STATES GRAPHITE CO. *v.* SAWYER, SECRETARY OF COMMERCE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *J. Marvin Haynes, N. Barr Miller* and *F. Eberhart Haynes* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for respondent. Reported below: 84 U. S. App. D. C. 336, 176 F. 2d 868.

No. 534. GLOVER *v.* COFFING, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Alfred P. Draper* for respondents. Reported below: 177 F. 2d 234.

No. 219, Misc. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 177 F. 2d 144.

No. 243, Misc. MCCORMACK *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 177 F. 2d 374.

No. 307, Misc. BRYAN *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. Reported below: 206 Ga. 73, 55 S. E. 2d 574.

No. 309, Misc. JOHNSON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 310, Misc. SMITH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 311, Misc. ZUBR *v.* RAGEN, WARDEN. Circuit Court of Will County, Circuit Court of Sangamon County, and Supreme Court of Illinois. Certiorari denied.

No. 312, Misc. WILSON *v.* RAGEN, WARDEN. Circuit Court of Kane County, Illinois. Certiorari denied.

No. 325, Misc. JOHNSON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 335, Misc. HAMBY *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 178 F. 2d 379.

No. 343, Misc. BAILEY *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 290, Misc. GELLATLY *v.* WETMORE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Stanley Suydam* and *John O. Dahlgren* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Melvin Richter* for respondent. Reported below: 85 U. S. App. D. C. 227, 177 F. 2d 73.

Rehearing Denied.

No. 71. FEDERAL POWER COMMISSION *v.* EAST OHIO GAS CO. ET AL., 338 U. S. 464. The petitions for rehearing

are denied. MR. JUSTICE BURTON took no part in the consideration or decision of these applications.

No. 81, Misc. EAGLE *v.* CHERNEY ET AL., 338 U. S. 837. Third petition for rehearing denied.

MARCH 13, 1950.*

Per Curiam Decisions.

No. 213. UNITED STATES EX REL. LEE WO SHING *v.* SHAUGHNESSY, ACTING DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Wong Yang Sung* v. *McGrath, ante,* p. 33. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Abraham Lebenkoff* and *Harry J. Stein* for petitioner. *Solicitor General Perlman* filed a memorandum for respondent. Reported below: 175 F. 2d 194.

No. 531. CARPET, LINOLEUM & RESILIENT FLOOR DECORATORS' UNION, LOCAL NO. 596, A. F. OF L., ET AL. *v.* DAYTON COMPANY. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a nonfederal ground adequate to support it. *William D. Gunn* and *David J. Erickson* for appellants. *Frank J. Morley* and *A. Lyman Beardsley* for appellee. Reported below: 229 Minn. 87, 39 N. W. 2d 183.

No. 544. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN ET AL. *v.* ILLINOIS. Appeal from the Supreme

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of the cases in which judgments or orders were this day announced.

Court of Illinois. *Per Curiam:* The appeal is dismissed. *United States* v. *Perkins,* 163 U. S. 625. *George I. Haight* for appellants. *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines, Raymond S. Sarnow* and *James C. Murray,* Assistant Attorneys General, for appellee. Reported below: 404 Ill. 193, 88 N. E. 2d 489.

No. 555. WASHINGTON EX REL. WASHINGTON WATER POWER CO. ET AL. *v.* SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY ET AL. Appeal from the Supreme Court of Washington. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Alan G. Paine* and *H. E. T. Herman* for appellants. *David M. Wood* and *Sam R. Sumner* for appellees. Reported below: 34 Wash. 2d 196, 208 P. 2d 849.

No. 559. STANDARD DREDGING CORP. *v.* LOUISIANA EX REL. FONTENOT, DIRECTOR OF REVENUE. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Eberhard P. Deutsch* for appellant. *John L. Madden* and *C. Ellis Ott* for appellee. Reported below: 216 La. 509, 43 So. 2d 909.

No. 563. MINNEAPOLIS STREET RAILWAY CO. *v.* MINNEAPOLIS ET AL. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judgment. *Fred A. Ossanna* for appellant. *John F. Bonner* for appellees. Reported below: 229 Minn. 502, 40 N. W. 2d 353.

No. 608. MILLER ET AL. *v.* SPOKANE ET AL. Appeal from the Supreme Court of Washington. *Per Curiam:* The motion to dismiss is granted and the appeal is dis-

missed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Claude L. Dawson* for appellants. *Charles S. Rhyne* for appellees. Reported below: 35 Wash. 2d 111, 211 P. 2d 165.

No. 644. LUSE *v.* CALIFORNIA. Appeal from the District Court of Appeal for the Second Appellate District of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Morris Lavine* and *Russell E. Parsons* for appellant. *Fred N. Howser,* Attorney General of California, *Howard S. Goldin* and *Frank W. Richards,* Deputy Attorneys General, for appellee. Reported below: 95 Cal. App. 2d 200, 212 P. 2d 582.

Miscellaneous Orders.

No. ——. LANCASTER ET AL. *v.* HAMMOND, ATTORNEY GENERAL OF MARYLAND, ET AL. The motion for a stay of the mandate of the Court of Appeals of Maryland, referred to the Court by MR. JUSTICE BLACK, is denied. *I. Duke Avnet* for appellants. *Hall Hammond,* Attorney General of Maryland, and *J. Edgar Harvey,* Deputy Attorney General, for appellees.

No. 154. WONG YANG SUNG *v.* MCGRATH, ATTORNEY GENERAL, ET AL., *ante,* p. 33. The motion of the Solicitor General to modify the judgment is granted and the judgment is modified so as to provide for the release of the prisoner from custody under the order of deportation but without terminating petitioner's custody under the warrant of arrest issued by the Attorney General dated October 13, 1947. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 512. BELL, SUPERINTENDENT OF BANKS, *v.* SINGER;

No. 513. BELL, SUPERINTENDENT OF BANKS, *v.* BANQUE MELLIE IRAN;

No. 527. SINGER *v.* YOKOHAMA SPECIE BANK, LTD. ET AL.; and

No. 528. BANQUE MELLIE IRAN *v.* BELL, SUPERINTENDENT OF BANKS. Lyon, present Superintendent of Banks, substituted for Bell.

Nos. 284 and 303, Misc. CAMERON *v.* SHAHEDY ET AL.; and

No. 285, Misc. CAMERON ET AL. *v.* SHAHEDY ET AL., 338 U. S. 951. The petition for rehearing and the motion for leave to file petition for writ of mandamus are denied.

No. 351, Misc. EX PARTE NEWSTEAD. The motion for leave to file petition for writ of mandamus is denied.

No. 371, Misc. RUTHVEN *v.* OVERHOLSER, SUPERINTENDENT. The motion for leave to file petition for writ of habeas corpus is denied.

No. 374, Misc. UNITED STATES EX REL. MONAGHAN *v.* BURKE, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

No. 376, Misc. EPPERSON *v.* MOORE, WARDEN. The motion for leave to file petition for writ of habeas corpus is denied.

Certiorari Granted. (*See also No. 213, supra.*)

No. 551. FOGARTY, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari granted. *Henry S. Blum* for petitioner. *Solicitor General Perl-*

man filed a memorandum stating that the United States does not oppose the granting of the petition. Reported below: 176 F. 2d 599.

No. 558. FERES, EXECUTRIX, *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Morris Pouser* and *David H. Moses* for petitioner. *Solicitor General Perlman* filed a memorandum stating that the United States does not oppose the granting of the petition. Reported below: 177 F. 2d 535.

No. 556. JOINT ANTI-FASCIST REFUGEE COMMITTEE *v.* MCGRATH, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *O. John Rogge* and *Benedict Wolf* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for respondents. Reported below: 85 U. S. App. D. C. 255, 177 F. 2d 79.

No. 381, Misc. JEFFERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. *Morris Rosenberg* for petitioner. *Solicitor General Perlman* filed a memorandum stating that the United States does not oppose the granting of the petition. Reported below: 178 F. 2d 518.

Certiorari Denied. (*See also No. 608 and Misc. No. 374, supra.*)

No. 496. MATTHEWS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *W. A. Bootle* for petitioners. *Solicitor General Perlman, James M. McInerney* and *Robert S. Erdahl* for the United States. Reported below: 177 F. 2d 278.

No. 506. CRAIN ET AL., TRUSTEES, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Geo. E. H. Goodner* and *Scott P. Crampton* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *John R. Benney* for the United States. Reported below: 114 Ct. Cl. 94, 84 F. Supp. 876.

No. 514. MACDONALD ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *M. Walton Hendry, Bernard J. Gallagher* and *J. Roy Thompson, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for the United States. Reported below: 113 Ct. Cl. 300, 83 F. Supp. 702.

Nos. 520, 521, 522, 523 and 524. PARAMOUNT PICTURES, INC. ET AL. *v.* BALL. C. A. 3d Cir. Certiorari denied. *Charles E. Kenworthey, Wm. A. Schnader, Bernard G. Segal* and *Arlin M. Adams* for petitioners. *Joseph W. Henderson* for respondent. Reported below: 176 F. 2d 1023.

No. 525. CLEMENT *v.* WOODS, HOUSING EXPEDITER. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Ed Dupree* and *Nathan Siegel* for respondent. Reported below: 177 F. 2d 376.

No. 530. SEABOARD AIR LINE RAILROAD CO. *v.* PROSSER ET AL. Supreme Court of South Carolina. Certiorari denied. *James B. McDonough, Jr.* for petitioner. Reported below: 216 S. C. 33, 56 S. E. 2d 591.

No. 537. POINTER, DOING BUSINESS AS POINTER-WILLAMETTE CO., *v.* SIX WHEEL CORP. C. A. 9th Cir. Certiorari denied. *Harold L. Cook* and *Lee R. Schermerhorn* for petitioner. Reported below: 177 F. 2d 153.

No. 538. NEW YORK EX REL. CHOOLOKIAN *v.* MISSION OF THE IMMACULATE VIRGIN ET AL. Court of Appeals of New York. Certiorari denied. *Louis B. Boudin* and *Samuel M. Blinken* for petitioner. *Charles G. Coster, Joseph V. McKee* and *Porter R. Chandler* for the Mission of the Immaculate Virgin et al.; and *John P. McGrath* for Hilliard, respondents. Reported below: 300 N. Y. 43, 88 N. E. 2d 362.

No. 540. BLANCHARD MACHINE CO. *v.* RECONSTRUCTION FINANCE CORPORATION PRICE ADJUSTMENT BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frank B. Wallis* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Newell A. Clapp, Paul A. Sweeney* and *Melvin Richter* for respondent. Reported below: 85 U. S. App. D. C. 361, 177 F. 2d 727.

No. 541. DE SAIRIGNE *v.* GOULD. C. A. 2d Cir. Certiorari denied. *Martin J. Kelly, Jr.* for petitioner. *John T. Cahill* for respondent. Reported below: 177 F. 2d 515.

No. 543. JIFFY LUBRICATOR CO. *v.* ALEMITE COMPANY. C. A. 8th Cir. Certiorari denied. *Leonard L. Kalish* and *C. A. Taney, Jr.* for petitioner. *Casper W. Ooms, Herbert G. Nilles, John D. Black* and *Elwood Hansmann* for respondent. Reported below: 176 F. 2d 444.

No. 545. CARPENTER *v.* ERIE RAILROAD CO. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *J. Roger Carroll* for respondent. Reported below: 178 F. 2d 921.

No. 549. KALB *v.* FEUERSTEIN ET AL. C. A. 7th Cir. Certiorari denied. *Wm. Lemke* for petitioner. *J. Arthur Moran* for respondents. Reported below: 177 F. 2d 243.

No. 550. Block et al. *v.* Detroit Harbor Terminals, Inc. C. A. 6th Cir. Certiorari denied. *Meyer Abrams* for petitioners. *Hugh Francis* for respondent. Reported below: 179 F. 2d 236.

No. 553. Sic *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. *Don W. Stewart* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Lee A. Jackson* for respondent. Reported below: 177 F. 2d 469.

No. 557. Overlakes Freight Corp. *v.* Murphy, Administratrix. C. A. 2d Cir. Certiorari denied. *Ulysses S. Thomas* for petitioner. *Frank Bloom* for respondent. Reported below: 177 F. 2d 342.

No. 560. Trapp *v.* United States. C. A. 10th Cir. Certiorari denied. *C. E. Ram Morrison, John B. Dudley* and *Charles H. Garnett* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 177 F. 2d 1.

No. 565. Young *v.* United States. C. A. 9th Cir. Certiorari denied. *Hugh H. Obear* and *Orville H. Walburn* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 178 F. 2d 78.

No. 566. Mitchell et al. *v.* White Consolidated, Inc. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioners. *Oscar C. Strom* and *Edmond J. Leeney* for respondent. Reported below: 177 F. 2d 500.

No. 567. Lyle *v.* Atchison, Topeka & Santa Fe Railway Co. et al. C. A. 7th Cir. Certiorari denied.

George F. Barrett for petitioner. *Floyd J. Stuppi, R. S. Outlaw* and *Thomas J. Barnett* for respondents. Reported below: 177 F. 2d 221.

No. 569. BEVERAGE, ADMINISTRATOR, ET AL. *v.* FARM BUREAU MUTUAL AUTOMOBILE INSURANCE CO. C. A. 4th Cir. Certiorari denied. *Joseph A. Fanelli, H. G. Muntzing* and *Glenn W. Ruebush* for petitioners. *Wayt B. Timberlake, Jr.* and *Robert Lewis Young* for respondent. Reported below: 177 F. 2d 793.

No. 576. L. N. JACKSON & CO., INC. *v.* ROYAL NORWEGIAN GOVERNMENT. C. A. 2d Cir. Certiorari denied. *Copal Mintz* for petitioner. *James McKown, Jr.* for respondent. Reported below: 177 F. 2d 694.

No. 494. SCHOEPS *v.* CARMICHAEL, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Landon, present District Director, substituted for Carmichael. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Israel Convisser* for respondent. Reported below: 177 F. 2d 391.

No. 517. COHEN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Perlman, James M. McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 177 F. 2d 523.

No. 578. WALSH *v.* WALSH. Supreme Court of Louisiana. Certiorari denied. *Alvin L. Newmyer, David G. Bress* and *Sheldon E. Bernstein* for petitioner. *Sidney L. Herold* for respondent. Reported below: 215 La. 1099, 42 So. 2d 860.

No. 607. JACOBS, DOING BUSINESS AS HENRY E. JACOBS & CO., *v.* CHARLES PECKAT MANUFACTURING CO. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Harry Abrahams* for petitioner. *Bernard A. Schroeder* and *Jules L. Brady* for respondents. Reported below: 178 F. 2d 794.

No. 275, Misc. WILFONG *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 177 F. 2d 144.

No. 315, Misc. QUINN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 333, Misc. CAMPBELL *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 347, Misc. BAKER *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se.* *A. E. Funk,* Attorney General of Kentucky, and *Zeb A. Stewart,* Assistant Attorney General, for respondent. Reported below: 311 Ky. 410, 224 S. W. 2d 433.

No. 368, Misc. LINNABERRY *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 377, Misc. HARROD *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Reported below: 311 Ky. 810, 226 S. W. 2d 4.

No. 378, Misc. VERMILLION *v.* MEYER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 380, Misc. SMITH *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. Reported below: 216 Ark. 1, 223 S. W. 2d 1011.

No. 393, Misc. PATTERSON *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Warren E. Hall, Jr.* for petitioner. Reported below: 206 Ga. 260, 56 S. E. 2d 501.

Rehearing Denied. (*See also Misc. Nos. 284, 285 and 303, supra.*)

No. 48. SAVORGNAN *v.* UNITED STATES ET AL., 338 U. S. 491;

No. 417. CAWTHORN *v.* UNITED STATES, 338 U. S. 909;

No. 505. TRANSPORT, TRADING & TERMINAL CORP. *v.* COMMISSIONER OF INTERNAL REVENUE, 338 U. S. 955;

No. 508. OWENS *v.* UNITED STATES, 338 U. S. 955;

No. 535. HORNER *v.* UNITED STATES, 338 U. S. 956;

No. 90, Misc. CROWE *v.* UNITED STATES, 338 U. S. 950;

No. 255, Misc. THOMPSON *v.* ROBINSON, WARDEN, 338 U. S. 950;

No. 287, Misc. AVELINO *v.* HEINZE, WARDEN, 338 U. S. 941; and

No. 345, Misc. PEREZ *v.* NEW YORK, 338 U. S. 952. The petitions for rehearing in these cases are severally denied.

No. 106, Misc. GRIFFIN *v.* UNITED STATES, 338 U. S. 952. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 377, Misc., October Term, 1948. FERGUSON, TEMPORARY ADMINISTRATOR, ET AL. *v.* FERGUSON, 337 U. S. 943. Second petition for rehearing denied.

MARCH 27, 1950.

Per Curiam Decision.

No. 653. STONE, CHAIRMAN OF THE STATE TAX COMMISSION, *v.* REICHMAN-CROSBY CO. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *J. H. Sumrall* for appellant. *S. Rufus Creekmore* for appellee. Reported below: 43 So. 2d 184.

Miscellaneous Orders.

No. 360, Misc. WAGNER *v.* LOUISIANA;

No. 366, Misc. HAINES *v.* RAGEN, WARDEN;

No. 385, Misc. PIERCE *v.* CRANOR, SUPERINTENDENT; and

No. 408, Misc. TAYLOR *v.* SQUIER, WARDEN. The motions for leave to file petitions for writs of habeas corpus in these cases are severally denied.

No. 407, Misc. COUTURE *v.* CRANOR, SUPERINTENDENT. The motion for leave to file petition for writ of certiorari is denied.

No. 439, Misc. IN RE O'NEILL. The petition is denied. *Thomas J. O'Neill, pro se.*

Certiorari Granted.

No. 596. HARRIS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari granted limited to Questions "2" and "3" presented by the petition for the writ, *i. e.:*

"2. Were the transfers made by the petitioner to her husband under a property settlement agreement dated

February 27, 1943, incidental to a Nevada divorce, made for an adequate and full consideration in money or money's worth and thus not subject to gift tax?

"3. Were the transfers made by the petitioner to her husband in 1943, in payment and discharge of a legal obligation imposed by the judgment of the Nevada Court entered March 6, 1943, and thus not subject to gift tax?"

Irwin N. Wilpon for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *I. Henry Kutz* for respondent. Reported below: 178 F. 2d 861.

No. 597. MISSOURI EX REL. SOUTHERN RAILWAY CO. *v.* MAYFIELD, CIRCUIT COURT JUDGE; and

No. 598. MISSOURI EX REL. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* MURPHY, CIRCUIT COURT JUDGE. Supreme Court of Missouri. Certiorari granted. *Sidney S. Alderman, Bruce A. Campbell* and *H. G. Hedrick* for petitioner in No. 597. *Floyd E. Thompson, J. C. Gibson* and *R. S. Outlaw* for petitioner in No. 598. Reported below: 359 Mo. 827, 224 S. W. 2d 105.

Certiorari Denied. (*See also No. 653 and Misc. No. 407, supra.*)

No. 499. CHURCH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Warren E. Miller* for petitioner. *Stephen J. Roth,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 561. STANDARD COMMERCIAL TOBACCO CO. ET AL. *v.* SNYDER, SECRETARY OF THE TREASURY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harold G. Aron, Raymond L. Wise* and *Richard L. Merrick* for petitioners. *Solicitor*

General Perlman, Assistant Attorney General Morison, Paul A. Sweeney and *Morton Hollander* for respondent. Reported below: 85 U. S. App. D. C. 425, 176 F. 2d 951.

No. 572. WINKLER ET AL. *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *I. Duke Avnet* for petitioners. *Hall Hammond,* Attorney General of Maryland, *Kenneth C. Proctor,* Assistant Attorney General, and *Anselm Sodaro* for respondent. Reported below: 69 A. 2d 674.

No. 573. ATLANTIC COAST LINE RAILROAD CO. *v.* SCARBOROUGH. C. A. 4th Cir. Certiorari denied. *J. M. Townsend* and *Collins Denny, Jr.* for petitioner. Reported below: 178 F. 2d 253.

No. 574. PIEDMONT COTTON MILLS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *William A. Sutherland* and *Joseph B. Brennan* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Melva M. Graney* for respondent. Reported below: 177 F. 2d 148.

No. 575. CONNER ET AL. *v.* PENNSYLVANIA RAILROAD CO. ET AL.;

No. 645. PENNSYLVANIA RAILROAD CO. *v.* CONNER ET AL.; and

No. 646. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* CONNER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John W. Cragun, Thomas Searing Jackson* and *Riley A. Gwynn* for petitioners in No. 575. *Guy W. Knight, R. N. Clattenburg, Hugh B. Cox* and *James G. Johnson, Jr.* for the Pennsylvania Railroad Co., petitioner in No. 645 and respondent in No. 575. *Carl McFarland* and *Ken-*

neth L. Kimble for the Brotherhood of Railroad Trainmen et al., petitioners in No. 646 and respondents in No. 575. Reported below: 85 U. S. App. D. C. 233, 177 F. 2d 854.

No. 577. HARTFORD FIRE INSURANCE CO. *v.* ROBERTO ET AL. C. A. 7th Cir. Certiorari denied. *Clarence G. Myers* for petitioner. *Hector A. Brouillet* for respondents. Reported below: 177 F. 2d 811.

No. 588. WAIALUA AGRICULTURAL CO., LTD. *v.* MANEJA ET AL. C. A. 9th Cir. Certiorari denied. *Rufus G. Poole, John A. Danaher, Milton C. Denbo* and *Philip Levy* for petitioner. Reported below: 178 F. 2d 603.

No. 589. AMERICAN BANTAM CAR CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *David Berger* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for respondent. Reported below: 177 F. 2d 513.

No. 602. LEE ET AL. *v.* PAN AMERICAN AIRWAYS, INC. Supreme Court of New York, County of Westchester. Certiorari denied. *Harold J. Sherman* for petitioners. *Donald Havens* for respondent.

No. 605. COHEN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Sidney G. Kusworm* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for the United States. Reported below: 178 F. 2d 588.

No. 612. DAVIS *v.* PROSE ET AL. C. A. 7th Cir. Certiorari denied. *Howard T. Batman* and *David I. Day, Jr.* for petitioner. *Solicitor General Perlman* filed a memorandum for the United States, respondent, stating that the Government occupies the role of a stakeholder and takes no position as to whether the writ of certiorari

should issue. *Robert J. McPeak* and *Ernest M. Causey* for Prose, respondent. Reported below: 177 F. 2d 478.

No. 552. MESTICE *v.* MASI. Supreme Court of New Jersey. The motion for leave to file a substituted petition is granted. Certiorari denied. Reported below: 3 N. J. 380, 70 A. 2d 539.

No. 564. LITTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 177 F. 2d 416.

No. 166, Misc. MCGOUGH ET AL. *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 174 F. 2d 353.

No. 170, Misc. ALRED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 177 F. 2d 193.

No. 202, Misc. CROMBIE *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines, James C. Murray* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent.

No. 207, Misc. CROMBIE *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied. Petitioner *pro se*. *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines, James C. Murray* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent.

No. 221, Misc. ILLINOIS EX REL. MARINO *v.* RAGEN, WARDEN; and

No. 222, Misc. MARINO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Wm. Scott Stewart* for

petitioner. *Ivan A. Elliott,* Attorney General of Illinois, for respondents. *Robert R. Canfield* filed a brief for Winnebago County, as *amicus curiae,* supporting respondents. Reported below: 404 Ill. 35, 37, 88 N. E. 2d 7, 8.

No. 246, Misc. KELLY *v.* DISTRICT COMMANDANT, U. S. NAVY, ET AL. C. A. 2d Cir. Certiorari denied. *D. George Paston* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for respondents. Reported below: 177 F. 2d 369.

No. 261, Misc. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 177 F. 2d 373.

No. 264, Misc. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 177 F. 2d 373.

No. 265, Misc. KINNEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 177 F. 2d 895.

No. 276, Misc. MOSS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 177 F. 2d 438.

No. 278, Misc. HOLT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 177 F. 2d 711.

No. 302, Misc. CLARK *v.* ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA. C. A. 5th Cir. Certiorari denied. *Robert Wilson Smith, Jr.* and *Hosea Alexander Stephens* for petitioner. *Harry L. Greene* for respondent. Reported below: 177 F. 2d 467.

No. 305, Misc. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Edward Thornton* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for the United States. Reported below: 177 F. 2d 582.

No. 313, Misc. ROYAL *v.* ROYAL. Probate Court of the County of Norfolk, Massachusetts. Certiorari denied. *Alfred A. Albert* for petitioner. *Nathan H. David* for respondent.

No. 317, Misc. MARRON, ADMINISTRATRIX, *v.* ATLANTIC REFINING CO. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Otto Wolff, Jr.* for respondent. Reported below: 176 F. 2d 313.

No. 331, Misc. BAUMET *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for the United States; and *George G. Gallantz* and *Thomas Thacher* for Peters, Executrix, respondents. Reported below: 177 F. 2d 806.

No. 344, Misc. HAWK *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. *Francis P. Matthews* for petitioner. Reported below: 151 Neb. 717, 39 N. W. 2d 561.

No. 346, Misc. WILSON *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 178 F. 2d 269.

No. 348, Misc. DALTON ET AL. *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Wm. W. Flournoy* for petitioners. Reported below: 42 So. 2d 174.

No. 352, Misc. FREDRICK *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 355, Misc. BROOKS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 358, Misc. NULL *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 361, Misc. MEYERS *v.* RAGEN, WARDEN. Circuit Court of Will County, and the Supreme Court of Illinois. Certiorari denied.

No. 362, Misc. SCHECTMAN *v.* FOSTER, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 363, Misc. TREADWAY *v.* MORHOUS, WARDEN. Supreme Court of New York. Certiorari denied.

No. 367, Misc. BORDAY *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 369, Misc. MOORE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 405 Ill. 220, 89 N. E. 2d 731.

No. 373, Misc. ALMEIDA *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Thomas J. Minnick, Jr.* for petitioner. *Colbert C. McClain* and *John H. Maurer* for respondent. Reported below: 362 Pa. 596, 68 A. 2d 595.

No. 383, Misc. MCCULLOUGH *v.* NEW YORK. Supreme Court of New York. Certiorari denied.

No. 386, Misc. NOVAK *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 389, Misc. WICKS *v.* SUPREME COURT OF INDIANA. Supreme Court of Indiana. Certiorari denied.

No. 394, Misc. NONN *v.* MICHIGAN ET AL. Supreme Court of Michigan. Certiorari denied.

No. 395, Misc. BUTE *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 397, Misc. RHEIM *v.* LYONS, COMMISSIONER. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Nathaniel L. Goldstein*, Attorney General of New York, *Wendell P. Brown*, Solicitor General, *Herman N. Harcourt* and *George A. Radz*, Assistant Attorneys General, for respondent.

No. 398, Misc. TANTHOREY *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 401, Misc. SKINNER *v.* ROBINSON, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 402, Misc. TAYLOR *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 403, Misc. VALECEK *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 404 Ill. 461, 89 N. E. 2d 368.

No. 405, Misc. PLAINE *v.* BURFORD, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 180 F. 2d 724.

No. 409, Misc. STEVENS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 356, Misc. MARKS *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Circuit Court of Randolph County, Illinois; and

No. 404, Misc. JAMES *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Criminal Court of Cook County, Illinois. The petition for writ of certiorari in each of these cases is denied without consideration of the questions raised therein and without prejudice to the institution by petitioner of proceedings in any Illinois state court of competent jurisdiction under the Act of August 4, 1949, entitled: "An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted." Laws of Illinois, 1949, p. 722.

Rehearing Denied.

No. 77. SOLESBEE *v.* BALKCOM, WARDEN, *ante*, p. 9;

No. 119. WISSNER ET AL. *v.* WISSNER, 338 U. S. 655;

No. 488. NATIONAL MARITIME UNION OF AMERICA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, 338 U. S. 954;

No. 301, Misc. TATE *v.* HEINZE, WARDEN, 338 U. S. 956; and

No. 316, Misc. STORY *v.* BURFORD, WARDEN, 338 U. S. 951. The petitions for rehearing in these cases are severally denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 76, Misc., October Term, 1945. STIZZA *v.* ESSEX COUNTY JUVENILE AND DOMESTIC RELATIONS COURT, 326 U. S. 696. Second petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

April 3, 1950.

Per Curiam Decision.

No. 657. Holmes et al. *v.* United States et al. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *David M. Palley* for appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission; and *Harold J. Gallagher* and *Mark F. Hughes* for the Macon, Dublin & Savannah Railroad Co., appellees. Reported below: 89 F. Supp. 894.

Miscellaneous Order.

No. 590. Pannell *v.* United States. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit dismissed on motion of counsel for the petitioner. *David Berger* and *Thomas D. McBride* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 178 F. 2d 98.

Certiorari Granted.

No. 609. Gara *v.* United States. C. A. 6th Cir. Certiorari granted. *John W. MacDonald* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Briefs of *amici curiae* supporting petitioner were filed by *Claude C. Smith* and *Harold Evans* for the American Friends Service Committee, Inc., and *Cable M. Gibson* for the Ohio Pastors Convention. Reported below: 178 F. 2d 38.

Certiorari Denied.

No. 591. Croessant *v.* United States. C. A. 3d Cir. Certiorari denied. *David Berger, Thomas D. McBride*

and *William J. Duiker* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 178 F. 2d 96.

No. 603. ECKERT-FAIR CONSTRUCTION CO. *v.* CAPITOL STEEL & IRON CO. C. A. 5th Cir. Certiorari denied. *J. N. Townsend, Jr.* for petitioner. Reported below: 178 F. 2d 338.

No. 606. LONDON GUARANTEE & ACCIDENT CO., LTD. ET AL. *v.* BEHRLE. Supreme Court of Rhode Island and Providence Plantations. Certiorari denied. *George A. Chadwick, Jr.* for petitioners. *Santi J. Paul* for respondent. Reported below: 75 R. I. —, 68 A. 2d 63.

No. 611. SCHURINK *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *J. Edward Thornton* and *Vincent F. Kilborn* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for the United States; and *S. P. Gaillard, Jr.* for Alley et al., respondents. Reported below: 177 F. 2d 809.

No. 617. PENNSYLVANIA *v.* CURTIS PUBLISHING CO. Supreme Court of Pennsylvania. Certiorari denied. *T. McKeen Chidsey,* Attorney General of Pennsylvania, *David Fuss,* Deputy Attorney General, and *Harry F. Stambaugh* for petitioner. *William H. Wood, Charles W. Hull* and *Geo. Ross Hull* for respondent. Reported below: 363 Pa. 299, 69 A. 2d 410.

No. 642. KEYES *v.* MADSEN ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *W. Gwynn Gardiner* and *James M. Earnest* for petitioner. *Vernon E. West, Chester H. Gray* and *Milton D. Korman* for respondent. Reported below: 86 U. S. App. D. C. 24, 179 F. 2d 40.

No. 655. Burlington Transportation Co. *v.* Stoltz. C. A. 10th Cir. Certiorari denied. *A. X. Erickson* for petitioner. *Clay R. Apple* for respondent. Reported below: 178 F. 2d 514.

No. 601. Atlantic Coast Line Railroad Co. et al. *v.* St. Joe Paper Co. et al. C. A. 5th Cir. Certiorari denied. *John W. Davis, Edgar G. Crossman, Edward W. Bourne, Charles Cook Howell* and *Richard B. Gwathmey* for petitioners. *James F. Byrnes, Giles J. Patterson* and *Donald Russell* for the St. Joe Paper Co.; *Robert R. Milam, Fred N. Oliver* and *Willard P. Scott* for Lynch et al.; *Clifton S. Thomson, Chester Bedell, Robert M. McCulloch* and *Gerhard R. Gerhard* for the Manhattan Company et al.; and *John M. Allison* for Conn, respondents. Reported below: 179 F. 2d 538.

No. 217, Misc. Cradle *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 85 U. S. App. D. C. 315, 178 F. 2d 962.

No. 365, Misc. Ball *v.* Alabama. Supreme Court of Alabama. Certiorari denied. *G. Ernest Jones* and *G. Ernest Jones, Jr.* for petitioner. *A. A. Carmichael,* Attorney General of Alabama, and *James T. Hardin,* Assistant Attorney General, for respondent. Reported below: 252 Ala. 686, 42 So. 2d 626.

No. 424, Misc. Simpson *v.* Louisiana. Supreme Court of Louisiana. Certiorari denied. *G. Wray Gill* for petitioner. Reported below: 216 La. 212, 43 So. 2d 585.

April 10, 1950.

Miscellaneous Orders.

No. 432, Misc. Jeronis *v.* Michigan. Application denied.

No. 438, Misc. Ruoff *v.* McLaughlin, U. S. District Judge. The motion for leave to file petition for writ of mandamus is denied. Mr. Justice Clark took no part in the consideration or decision of this application. *Raoul Berger* and *Jack Wasserman* for petitioner.

Certiorari Granted. (*See No. 236, ante, p. 258.*)

Certiorari Denied.

No. 547. Snyder *v.* Woods, Housing Expediter. United States Emergency Court of Appeals. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, John R. Benney, Ed Dupree, Charles P. Liff* and *Philip Travis* for respondent.

No. 580. United States *v.* Union Pacific Railroad Co. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *T. W. Bockes, Elmer B. Collins* and *Lawrence Cake* for respondent. Reported below: 114 Ct. Cl. 714, 86 F. Supp. 907.

No. 604. Tex-O-Kan Flour Mills Co., doing business as Perry Burrus Elevators, *v.* Texas & Pacific Railway Co. C. A. 5th Cir. Certiorari denied. *Frank A. Leffingwell* for petitioner. *Bryan F. Williams* filed a brief for the Board of Trustees of the Galveston Wharves et al., as *amici curiae,* supporting petitioner. Reported below: 178 F. 2d 89.

No. 610. STRONG, TRADING AS STRONG MANUFACTURING CO., *v.* SMITH, COLLECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Filindo B. Masino* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Robert N. Anderson* for respondent. Reported below: 178 F. 2d 664.

No. 615. MANSAVAGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 178 F. 2d 812.

No. 618. CONTINENTAL OIL CO. *v.* JONES, COLLECTOR OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *David A. Richardson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Melva M. Graney* for respondent. Reported below: 177 F. 2d 508.

No. 619. WILMINGTON TRUST CO. *v.* MUTUAL LIFE INSURANCE CO. C. A. 3d Cir. Certiorari denied. *E. Ennalls Berl, Wm. S. Potter* and *Theodore S. Hope, Jr.* for petitioner. *Charles I. Thompson* and *James R. Morford* for respondent. Reported below: 177 F. 2d 404.

No. 633. KEOKUK STEEL CASTING CO. *v.* LAWRENCE. C. A. 10th Cir. Certiorari denied. *G. C. Spillers* for petitioner. Reported below: 178 F. 2d 788.

No. 650. NEW YORK LIFE INSURANCE CO. *v.* SCHIEL ET AL. C. A. 9th Cir. Certiorari denied. *Denison Kitchel* for petitioner. *J. Andrew West* for respondents. Reported below: 178 F. 2d 729.

No. 622. PHILLIPS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 623. PHILLIPS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 624. PHILLIPS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 625. PHILLIPS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 626. PHILLIPS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 627. SUCCOP *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 628. ESTATE OF PHILLIPS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 629. ESTATE OF PHILLIPS *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 630. BISIKER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *W. A. Seifert* and *Sidney B. Gambill* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 178 F. 2d 270.

No. 666. MONOLITH PORTLAND MIDWEST CO. *v.* RECONSTRUCTION FINANCE CORPORATION. C. A. 9th Cir. Certiorari denied. *Welburn Mayock* and *Joseph T. Enright* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for respondent. Reported below: 178 F. 2d 854.

No. 676. CARPENTER *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *W. H. Strickland* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *T. W. Bruton,* Assistant Attorney General, for respondent.

No. 677. DOVER *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *W. H. Strickland* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *T. W. Bruton,* Assistant Attorney General, for respondent.

No. 678. STINNETT *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *W. H. Strickland* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *T. W. Bruton,* Assistant Attorney General, for respondent.

No. 197. MARSHALL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Osmond K. Fraenkel* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Briefs of *amici curiae* supporting petitioner were filed by *Robert J. Silberstein* and *Benedict Wolf* for the National Lawyers Guild; *Nathan Witt* for the Civil Rights Congress; *Thomas R. Jones* for the Council on African Affairs, Inc.; *William L. Standard* for the Congress of American Women; *Victor Rabinowitz, Nathan Witt* and *Leonard B. Boudin* for the American Communications Association (CIO) et al.; *Leo J. Linder* for the Methodist Federation for Social Action; *Lester M. Levin* for the National Council of the Arts, Sciences and Professions; and *John J. Abt* for the Progressive Party of America et al. Reported below: 85 U. S. App. D. C. 184, 176 F. 2d 473.

No. 620. LOUCOPANTIS ET AL. *v.* THE OLYMPOS ET AL. C. A. 4th Cir. Certiorari denied. *J. L. Morewitz* for petitioners. *Barron F. Black* and *Hugh S. Meredith* for respondents. Reported below: 177 F. 2d 785.

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No. 248. LAWSON *v.* UNITED STATES; and

No. 249. TRUMBO *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Robert W. Kenny, Charles H. Houston, Bartley C. Crum* and *Martin Popper* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Harold D. Cohen* for the United States. Briefs of *amici curiae* supporting petitioner in No. 248 were filed by *Arthur Garfield Hays* and *Osmond K. Fraenkel* for the American Civil Liberties Union et al.; and *Allan Rosenberg* for the Samuel Adams School for Social Studies. Briefs of *amici curiae* supporting petitioners were filed by *Max Radin* for Meiklejohn et al.; *Harold M. Sawyer* for the National Union of Marine Cooks and Stewards; *William L. Standard* for the Congress of American Women and for the Conference of Studio Unions et al.; *Victor Rabinowitz, Nathan Witt* and *Leonard B. Boudin* for the American Communications Association (CIO) et al.; *Leo J. Linder* for the Methodist Federation for Social Action; *Samuel Neuburger* for the American Slav Congress; *Will Maslow, Thurgood Marshall, Shad Polier* and *Joseph B. Robison* for the American Jewish Congress et al.; *Lester M. Levin* for the National Council of the Arts, Sciences and Professions; and *John J. Abt* for the Progressive Party of America et al. *Louis Waldman* filed a brief, as *amicus curiae,* for the American Writers Association, Inc., supporting the United States. Reported below: 85 U. S. App. D. C. 167, 176 F. 2d 49.

No. 495. ANHEUSER-BUSCH, INC. *v.* DU BOIS BREWING CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this

application. *Wallace H. Martin, Minturn de S. Verdi* and *Walter J. Halliday* for petitioner. *Elder W. Marshall* and *John C. Bane, Jr.* for respondent. Reported below: 175 F. 2d 370.

No. 548. GORDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *William C. Wines* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 178 F. 2d 896.

No. 364, Misc. JOHNSON ET AL. *v.* GARDNER, TRUSTEE. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioners. *Thomas S. Tobin* for respondent. Reported below: 179 F. 2d 114.

No. 382, Misc. ADKINS, ADMINISTRATRIX, *v.* E. I. DU PONT DE NEMOURS & CO., INC. ET AL. C. A. 10th Cir. Certiorari denied. *John W. Porter, Jr.* for petitioner. *Solicitor General Perlman* for the United States, respondent, waived the right to file reply to the petition. *G. C. Spillers* for the Du Pont Co., respondent.

No. 390, Misc. WATSON *v.* SUDDOTH ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *J. G. Burke* for respondent. Reported below: 177 F. 2d 371.

No. 391, Misc. ROWE *v.* GREEN. C. A. 4th Cir. Certiorari denied.

No. 425, Misc. EVERHART *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 154 Tex. Cr. R. ——, 226 S. W. 2d 637.

No. 427, Misc. FALKENSTEIN *v.* NEW YORK. Appellate Division of the Supreme Court of New York. Certiorari denied.

No. 428, Misc. HOLLAND *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 437, Misc. HOLMES *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied.

No. 457, Misc. VARELA ET AL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Richard J. Gleason* for petitioners. Reported below: 405 Ill. 236, 90 N. E. 2d 631.

No. 459, Misc. SEGER ET AL. *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 405 Ill. 222, 90 N. E. 2d 637.

Rehearing Denied.

No. 403. REIDER *v.* THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD CO., *ante,* p. 113. Rehearing denied. MR. JUSTICE JACKSON and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 517. COHEN ET AL. *v.* UNITED STATES, *ante,* p. 914. Rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 255, Misc. THOMPSON *v.* ROBINSON, WARDEN, 338 U. S. 950. Second petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

APRIL 17, 1950.

Miscellaneous Order.

No. 449, Misc. POTTER *v.* EIDSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Denied.

No. 353. CALIFORNIA-MICHIGAN LAND & WATER CO. *v.* CITY OF PASADENA ET AL. Supreme Court of California. Certiorari denied. *Joseph L. Lewinson* and *Richard C. Goodspeed* for petitioner. *A. E. Chandler* for respondents. Reported below: 33 Cal. 2d 908, 207 P. 2d 17, 46.

No. 595. ROBERTS, SUPERINTENDENT OF THE FIVE TRIBES AGENCY, FOR QUAPAW INDIANS, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Huston Thompson* and *Oscar P. Mast* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Helen Goodner* for the United States. Reported below: 115 Ct. Cl. 428, 87 F. Supp. 935.

No. 614. BROCK *v.* SOLOMON, TRUSTEE; and

No. 675. BECKER *v.* SOLOMON, TRUSTEE. C. A. 7th Cir. Certiorari denied. *Leo L. Donahoe* for petitioner in No. 614. *James A. Cosgrove* for petitioner in No. 675. *Leslie G. Pefferle* for respondent. Reported below: 178 F. 2d 819.

No. 631. MORAIRTY *v.* MUTUAL LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. *Elias S. Clark* for petitioner. *Denison Kitchel* for respondent. Reported below: 178 F. 2d 470.

No. 641. JACKSON ET AL., PRACTICING AS JACKSON & HORAN, *v.* VANCE, TRUSTEE, ET AL. C. A. 10th Cir. Cer-

tiorari denied. *Arthur T. Hannett* for petitioners. *James R. Modrall* for respondents. Reported below: 179 F. 2d 154.

No. 643. Allied Oil Corp. *v.* Socony-Vacuum Oil Co., Inc. C. A. 7th Cir. Certiorari denied. *Thomas J. Downs* for petitioner. *J. F. Dammann* for respondent. Reported below: 178 F. 2d 239.

No. 669. Republic Steel Corp. *v.* Farval Corporation. C. A. 6th Cir. Certiorari denied. *Walter J. Blenko* and *John H. F. Leonard* for petitioner. *John F. Oberlin* for respondent. Reported below: 179 F. 2d 719.

No. 291, Misc. Langford *v.* United States. C. A. 9th Cir. Certiorari denied. *Henry G. Bodkin* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 178 F. 2d 48.

No. 336, Misc. Thomasson *v.* Missouri. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *J. E. Taylor,* Attorney General of Missouri, and *Gordon P. Weir,* Assistant Attorney General, for respondent.

No. 400, Misc. Kent *v.* Michigan. Supreme Court of Michigan. Certiorari denied.

No. 406, Misc. Winegard *v.* Swenson, Warden. Court of Appeals of Maryland. Certiorari denied. *Joseph Kadans* for petitioner. Reported below: 69 A. 2d 685.

No. 413, Misc. Smith et al. *v.* Holt et ux. Court of Appeals of Kentucky. Certiorari denied.

No. 417, Misc. CUBBLER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 419, Misc. BINDRIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 404 Ill. 520, 89 N. E. 2d 530.

No. 426, Misc. BLUE *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 435, Misc. DUNLEVY *v.* ROBINSON, WARDEN. Circuit Court of Sangamon County, Illinois. Certiorari denied.

No. 450, Misc. WILD *v.* BURFORD, WARDEN. District Court of the County of McCurtain, Oklahoma. Certiorari denied.

No. 396, Misc. BRIDGES *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *J. C. B. Ehringhaus, Jr.* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *T. W. Bruton,* Assistant Attorney General, for respondent. Reported below: 231 N. C. 163, 56 S. E. 2d 397.

Rehearing Denied.

No. 359. HIATT, WARDEN, *v.* BROWN, *ante,* p. 103;

No. 525. CLEMENT *v.* WOODS, HOUSING EXPEDITER, *ante,* p. 911;

No. 543. JIFFY LUBRICATOR CO. *v.* ALEMITE COMPANY, *ante,* p. 912;

No. 545. CARPENTER *v.* ERIE RAILROAD CO., *ante,* p. 912; and

No. 351, Misc. EX PARTE NEWSTEAD, *ante,* p. 909. The petitions for rehearing in these cases are severally denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

April 24, 1950.

Per Curiam Decisions.

No. 490. United States *v.* Cotton Valley Operators Committee et al. Appeal from the United States District Court for the Western District of Louisiana. Argued April 18, 1950. Decided April 24, 1950. *Per Curiam:* The judgment is affirmed by an equally divided Court. Mr. Justice Clark took no part in the consideration or decision of this case. *Assistant Attorney General Bergson* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Charles H. Weston, Stanley M. Silverberg* and *Richard E. Guggenheim. Arthur O'Quin* argued the cause for the Ohio Oil Co. et al., appellees. With him on the brief were *Charles D. Egan, David E. Smitherman, John M. Madison, W. Scott Wilkinson, H. F. Aby, Leslie Moses, A. M. Gee, C. F. Currier* and *Leon O'Quin. Charles L. Black* argued the cause for the Stanolind Oil & Gas Co. et al., appellees. With him on the brief were *Donald Campbell, W. W. Heard* and *Dan Moody. Chas. B. Wallace, Walace Hawkins* and *Earl A. Brown* submitted on brief for the Magnolia Petroleum Co., appellee.

No. 725. Tedesco *v.* Board of Supervisors of Elections for the Parish of Orleans et al. Appeal from the Court of Appeal for the Parish of Orleans, Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *George A. Dreyfous* for appellant. *Bolivar E. Kemp, Jr.,* Attorney General of Louisiana, *Wm. A. Porteous, Jr.,* Second Assistant Attorney General, and *Chas. J. Rivet* for appellees. Reported below: 43 So. 2d 514.

No. 727. Hopkins *v.* Maryland. Appeal from the Court of Appeals of Maryland. *Per Curiam:* The appeal

is dismissed for want of a substantial federal question. *Louis S. Ashman* for appellant. Reported below: 69 A. 2d 456.

Miscellaneous Orders.

No. 430, Misc. E. I. Du Pont de Nemours & Co. et al. *v.* United States District Court for the Northern District of Illinois et al. The motion for leave to file petition for writ of mandamus and/or certiorari is denied. *Gerhard A. Gesell, Paul H. Arthur, John M. Harlan* and *Aaron Finger* for petitioners. *Solicitor General Perlman, Assistant Attorney General Bergson* and *Charles H. Weston* for the United States, respondent.

No. 455, Misc. Spillmann *v.* Jackson, Warden. The motion for leave to file petition for writ of certiorari is denied.

No. 464, Misc. Slade *v.* Jacques, Warden. The motion for leave to file petition for writ of habeas corpus is denied.

Certiorari Granted.

Nos. 648 and 649. United States *v.* Munsingwear, Inc. C. A. 8th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *John M. Palmer* for respondent. Reported below: 178 F. 2d 204.

Certiorari Denied. (*See also Misc. Nos. 430 and 455, supra.*)

No. 546. Eddy et al. *v.* Prudence Bonds Corp. et al. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *Charles M. McCarty* for respondent.

No. 571. HELM *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *E. P. Carville* for petitioner. *Alan Bible,* Attorney General of Nevada, *Geo. P. Annand* and *Robert L. McDonald,* Deputy Attorneys General, for respondent. Reported below: 66 Nev. —, 209 P. 2d 187.

No. 592. UNITED STATES *v.* PEVELY DAIRY CO.; and

No. 593. UNITED STATES *v.* ST. LOUIS DAIRY CO. C. A. 8th Cir. Certiorari denied. *Arnold Raum* for the United States. *William H. Allen, James A. Finch* and *E. C. Hartman* for respondent in No. 592. *Jacob M. Lashly* for respondent in No. 593. Reported below: 178 F. 2d 363.

No. 616. PLAINFIELD HOTEL CORP. *v.* CITY OF BUFFALO. C. A. 2d Cir. Certiorari denied. *James P. Kohler* for petitioner. *Herbert A. Hickman* for respondent. Reported below: 177 F. 2d 425.

No. 632. TAMEZ, EXECUTRIX, *v.* WOODS, HOUSING EXPEDITER. C. A. 5th Cir. Certiorari denied. *William Robert Smith, Jr.* for petitioner. *Solicitor General Perlman, Ed Dupree, Nathan Siegel* and *Benjamin Freidson* for respondent. Reported below: 177 F. 2d 639.

No. 634. UNION PACIFIC RAILROAD CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Elmer B. Collins* and *Lawrence Cake* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for the United States. Reported below: 115 Ct. Cl. 321, 87 F. Supp. 957.

No. 652. KJAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N.*

Slack, Helen Goodner and *Homer R. Miller* for the United States. Reported below: 177 F. 2d 630.

No. 656. RING CONSTRUCTION CORP. *v.* SECRETARY OF WAR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Josiah E. Brill* and *Robert A. Littleton* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Melvin Richter* for respondent. Reported below: 85 U. S. App. D. C. 386, 178 F. 2d 714.

No. 660. LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT *v.* BOND BROTHERS. Court of Appeals of Kentucky. Certiorari denied. *Blakey Helm* and *Gilbert Burnett* for petitioner. *Ernest Woodward* and *Squire R. Ogden* for respondent. Reported below: 312 Ky. 601, 228 S. W. 2d 655.

No. 661. COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF MASSACHUSETTS *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Francis E. Kelly,* Attorney General of Massachusetts, *Francis J. Roche* and *David H. Stuart,* Assistant Attorneys General, for petitioner. *Hermon J. Wells* for respondent. Reported below: 178 F. 2d 559.

No. 662. MATHEY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. *Lawrence E. Green* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Irving I. Axelrad* for respondent. Reported below: 177 F. 2d 259.

No. 665. BALTIMORE & OHIO RAILROAD CO. *v.* HOPPER PAPER CO. C. A. 7th Cir. Certiorari denied. *Edwin H. Burgess, Frederick E. Baukhages, William A. Eggers* and

James J. Graham for petitioner. *Henry R. Barber* and *Virginia W. Barber* for respondent. Reported below: 178 F. 2d 179.

No. 683. THROCKMORTON *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. C. A. 8th Cir. Certiorari denied. *Edward F. Prichard, Jr.* for petitioner. *Roscoe Anderson* and *C. H. Skinker, Jr.* for respondent. Reported below: 179 F. 2d 165.

No. 337, Misc. BYERS *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 392, Misc. CROMELIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 177 F. 2d 275.

No. 440, Misc. MITCHELL *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 442, Misc. STERBA *v.* BORELLI, JUDGE, ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 443, Misc. RIVERS *v.* INDIANA. Circuit Court of St. Joseph County, Indiana. Certiorari denied.

No. 444, Misc. SWOVELAND *v.* SMYTH, SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 447, Misc. ROHDE *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 448, Misc. BARNES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 405 Ill. 30, 89 N. E. 2d 791.

No. 451, Misc. WAGNER *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 452, Misc. NELSON *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 461, Misc. ADAMS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 465, Misc. PERROZZI *v.* RAGEN, WARDEN. Circuit Court of Will County, Criminal Court of Cook County, and Supreme Court of Illinois. Certiorari denied.

No. 473, Misc. WULSCH *v.* ROBINSON, WARDEN. Circuit Court of Saint Clair County, Illinois. Certiorari denied.

No. 387, Misc. QUILLIAN *v.* SWEENEY, SHERIFF, ET AL. Court of Appeals of Cuyahoga County, Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion the petition should be granted. *Frank C. Lyons* for petitioner. *Frank T. Cullitan* and *Gertrude M. Bauer* for Sweeney, respondent.

No. 388, Misc. WOODALL *v.* SWEENEY, SHERIFF, ET AL. Court of Appeals of Cuyahoga County, Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion the petition should be granted. *Frank C. Lyons* for petitioner. *Frank T. Cullitan* and *Gertrude M. Bauer* for Sweeney, respondent.

Rehearing Denied.

No. 280. WILLAPOINT OYSTERS, INC. *v.* EWING, ADMINISTRATOR, ET AL., 338 U. S. 860. The motion for leave to file petition for rehearing is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 552. MESTICE *v.* MASI, *ante,* p. 921;

No. 596. HARRIS *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 917; and

No. 397, Misc. RHEIM *v.* LYONS, COMMISSIONER, *ante,* p. 925. The petitions for rehearing in these cases are severally denied.

MAY 1, 1950.

Per Curiam Decisions.

No. 427. FLOWERS *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *W. M. Mize* for appellant. *Greek L. Rice,* Attorney General of Mississippi, and *George H. Ethridge,* Assistant Attorney General, for appellee. Reported below: —— Miss. ——, 41 So. 2d 352.

No. 687. FRANKLIN *v.* HARPER ET AL. Appeal from the Supreme Court of Georgia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Franklin H. Pierce* for appellant. Appellees *pro se.* Reported below: 205 Ga. 779, 55 S. E. 2d 221.

Miscellaneous Orders.

No. 468, Misc. KEITH *v.* MILLER, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

No. 470, Misc. EPPLE *v.* DUFFY, WARDEN; and

No. 471, Misc. HOBBS *v.* SWENSON, WARDEN. The motions for leave to file petitions for writs of habeas corpus are denied.

Certiorari Granted.

Nos. 584, 585, 586 and 587. UNITED STATES *v.* SECURITY TRUST & SAVINGS BANK OF SAN DIEGO, EXECUTOR, ET AL. District Court of Appeal for the Fourth Appellate District of California. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 93 Cal. App. 2d 608, 209 P. 2d 657.

No. 686. GREAT ATLANTIC & PACIFIC TEA CO. *v.* SUPERMARKET EQUIPMENT CORP. C. A. 6th Cir. Certiorari granted. *John H. Glaccum* for petitioner. *Townsend F. Beaman* and *Lloyd W. Patch* for respondent.. Reported below: 179 F. 2d 636.

Certiorari Denied. (*See also No. 427 and Misc. No. 468, supra.*)

No. 542. DUNCAN COFFEE CO. *v.* RECONSTRUCTION FINANCE CORPORATION. United States Emergency Court of Appeals. Certiorari denied. *Samuel H. Peak* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *John R. Benney* for respondent. Reported below: 178 F. 2d 926.

No. 562. LOCAL 36, INTERNATIONAL FISHERMEN & ALLIED WORKERS OF AMERICA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert W. Kenny* for petitioners. *Solicitor General Perlman, Assistant Attorney General Bergson* and *J. Roger Wollenberg* for the United States. Reported below: 177 F. 2d 320.

No. 651. BURNS ET AL. *v.* MUTUAL BENEFIT LIFE INSURANCE CO. C. A. 6th Cir. Certiorari denied. *Solomon W. Patek* for petitioners. Reported below: 179 F. 2d 236.

No. 658. STEINWAY *v.* MAJESTIC AMUSEMENT CO. ET AL. C. A. 10th Cir. Certiorari denied. *Neal E. McNeill*

for petitioner. *John A. Johnson* for respondents. Reported below: 179 F. 2d 681.

No. 668. INSURANCE COMPANY OF NORTH AMERICA *v.* HOWE. C. A. 6th Cir. Certiorari denied. *James A. Butler* for petitioner. *Raymond T. Jackson* for respondent. Reported below: 179 F. 2d 239.

No. 672. HYGIENIC PRODUCTS CO. *v.* JUDSON DUNAWAY CORP.; and

No. 681. JUDSON DUNAWAY CORP. *v.* HYGIENIC PRODUCTS CO. C. A. 1st Cir. Certiorari denied. *Harry Frease, Joseph Frease* and *Randolph C. Richardson* for petitioner in No. 672. *Manvel Whittemore, Charles F. Miller, Jr.* and *Lucius E. Varney* for the Judson Dunaway Corporation. Reported below: 178 F. 2d 461.

No. 673. GRAY ET AL. *v.* OLDLAND ET AL. C. A. 10th Cir. Certiorari denied. *George L. Sneed, Frederic L. Kirgis* and *Jean S. Breitenstein* for petitioners. *Frank Delaney* and *L. H. Larwill* for Oldland et al.; and *Charles J. Moynihan* for Rector et al., respondents. Reported below: 179 F. 2d 408.

No. 679. JONES ET AL. *v.* GUTOWSKY. C. A. 10th Cir. Certiorari denied. *Herbert J. Patrick, Logan Stephenson* and *Cleon R. Nixon* for petitioners. Reported below: 178 F. 2d 60.

No. 688. POWELL *v.* YOUNG. C. A. 5th Cir. Certiorari denied. *John O. Harris* for petitioner. *Richard T. Rives* for respondent. Reported below: 179 F. 2d 147.

No. 692. M. & M. TRANSPORTATION CO. *v.* CITY OF NEW YORK ET AL. Court of Appeals of New York. Certiorari denied. *Joseph Rotwein* for petitioner. *John P. McGrath* and *Stanley Buchsbaum* for respondents.

No. 694. ALBRECHT ET AL. *v.* INDIANA HARBOR BELT RAILROAD CO. C. A. 7th Cir. Certiorari denied. *John H. Gately* for petitioners. *Sidney C. Murray, Marvin A. Jersild, Victor L. Lewis* and *Owen W. Crumpacker* for respondent. Reported below: 178 F. 2d 577.

Nos. 695 and 696. HANDWORK ET AL., TRUSTEES, *v.* YOUNG, TRUSTEE IN BANKRUPTCY. C. A. 7th Cir. Certiorari denied. *Homer D. Dines* for petitioners. *Horace A. Young, pro se.* Reported below: 179 F. 2d 70.

No. 733. CHARTER OAK FIRE INSURANCE CO. ET AL. *v.* GERRITY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edwin A. Swingle* and *William E. Miller* for petitioners. *William E. Leahy* and *Raymond F. Garrity* for respondents. Reported below: 86 U. S. App. D. C. 199, 181 F. 2d 614.

No. 674. GREGOIRE *v.* BIDDLE ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Gunther Jacobson* and *Emily Marx* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Morton Hollander* for respondents. Reported below: 177 F. 2d 579.

No. 697. BERLINSKY *v.* WOODS, HOUSING EXPEDITER, ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, John R. Benney, Ed Dupree, Leon J. Libeu* and *Nathan Siegel* for respondents. Reported below: 178 F. 2d 265.

No. 324, Misc. LOWE *v.* KILLINGER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

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No. 422, Misc. ARRINGTON *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. *Franklin H. Williams, Robert L. Carter* and *Thurgood Marshall* for petitioner. *A. A. Carmichael,* Attorney General of Alabama, and *M. R. Nachman,* Assistant Attorney General, for respondent. Reported below: 253 Ala. 178, 43 So. 2d 644.

No. 441, Misc. HOLT *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 454, Misc. YOUNG *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 14. DENNIS *v.* UNITED STATES, *ante,* p. 162. Rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 163. COMMODITIES TRADING CORP. ET AL. *v.* UNITED STATES; and

No. 156. UNITED STATES *v.* COMMODITIES TRADING CORP. ET AL., *ante,* p. 121; and

No. 337. RAILWAY LABOR EXECUTIVES' ASSOCIATION *v.* UNITED STATES ET AL., *ante,* p. 142. The petitions for rehearing in these cases are severally denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 301, Misc. TATE *v.* HEINZE, WARDEN, 338 U. S. 956. Second petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 373, Misc. ALMEIDA *v.* PENNSYLVANIA, *ante,* p. 924. Rehearing denied.

MAY 8, 1950.

Miscellaneous Order.

No. 498, Misc. COLLINS ET AL. *v.* LETTS, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writs of prohibition and mandamus denied.

Certiorari Granted.

No. 685. UNITED STATES *v.* GRIGGS, EXECUTRIX. C. A. 10th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 178 F. 2d 1.

No. 732. NATIONAL LABOR RELATIONS BOARD *v.* PITTSBURGH STEAMSHIP CO. C. A. 6th Cir. Certiorari granted. *Solicitor General Perlman* and *Robert N. Denham* for petitioner. *Nathan L. Miller, Lee C. Hinslea* and *Lucian Y. Ray* for respondent. Reported below: 180 F. 2d 731.

No. 294, Misc. SNYDER *v.* BUCK, PAYMASTER GENERAL OF THE NAVY. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *John Geyer Tausig* and *Gibbs L. Baker* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Morton Hollander* for respondent. Reported below: 85 U. S. App. D. C. 198, 177 F. 2d 44.

Certiorari Denied.

No. 581. AMERICAN PRESIDENT LINES, LTD. *v.* AGNEW ET AL.;

No. 582. AMERICAN PRESIDENT LINES, LTD. *v.* GRIFFIN ET AL.; and

No. 583. AMERICAN PRESIDENT LINES, LTD. *v.* FEDERER ET AL. C. A. 9th Cir. Certiorari denied. *Ira S. Lillick* for petitioner. *Albert Michelson* for respondents

in Nos. 581 and 582; and *Herbert Resner* for respondents in No. 583. Reported below: 177 F. 2d 107, 111.

No. 680. UNITED ARTISTS CORP. ET AL. *v.* BOARD OF CENSORS OF MEMPHIS ET AL. Supreme Court of Tennessee. Certiorari denied. *Hamilton E. Little, Edward C. Raftery* and *Lowell W. Taylor* for petitioners. *J. S. Allen* for respondents. Reported below: 189 Tenn. 397, 225 S. W. 2d 550.

No. 684. FIREMAN'S FUND INSURANCE CO. *v.* MCCONNELL. C. A. 5th Cir. Certiorari denied. *Alex W. Smith* and *R. Wilson Smith, Jr.* for petitioner. *A. C. Wheeler* for respondent. Reported below: 178 F. 2d 76.

No. 691. BROWN *v.* ROYALL, SECRETARY OF THE ARMY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Morton Singer, P. Bateman Ennis, Edward Holloway* and *Philip F. La Follette* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for respondents.

No. 693. SAFEWAY STORES, INC. *v.* WEST ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Cornelius H. Doherty* for petitioner. *Austin F. Canfield* for respondents. Reported below: 86 U. S. App. D. C. 100, 180 F. 2d 25.

No. 698. RANDOLPH LABORATORIES, INC. *v.* SPECIALTIES DEVELOPMENT CORP. C. A. 3d Cir. Certiorari denied. *Ralph M. Snyder* for petitioner. *Floyd H. Crews* for respondent. Reported below: 178 F. 2d 477.

No. 699. ROWLAND *v.* ARKANSAS. C. A. 8th Cir. Certiorari denied. *C. Floyd Huff, Jr.* for petitioner. *Ike Murry,* Attorney General of Arkansas, *John Williams,*

Chief Assistant Attorney General, and *Jeff Duty*, Assistant Attorney General, for respondent. Reported below: 179 F. 2d 709.

No. 706. CITIZENS ICE & COLD STORAGE CO. ET AL. *v.* ATLANTIC COMPANY. C. A. 5th Cir. Certiorari denied. *Julian Webb* for petitioners. *William K. Meadow* and *Robert B. Troutman* for respondent. Reported below: 178 F. 2d 453.

No. 707. PARKERSON, TRUSTEE, ET AL. *v.* CHAPMAN ET AL., EXECUTORS. C. A. 4th Cir. Certiorari denied. *Russell T. Bradford* for petitioners. *Albert W. Fox* and *Thomas H. Patterson* for respondents. Reported below: 179 F. 2d 208.

No. 729. TEXAS & PACIFIC RAILWAY CO. *v.* RED RIVER COTTON OIL CO. ET AL. Supreme Court of Louisiana. Certiorari denied. *Frank H. Peterman* for petitioner. *LeDoux R. Provosty* for respondents. Reported below: 216 La. 519, 44 So. 2d 101.

No. 731. HOFFPAUIR *v.* HOXSEY. C. A. 5th Cir. Certiorari denied. *Curley C. Hoffpauir, pro se.* Reported below: 180 F. 2d 84.

No. 594. MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, *v.* PARAMOUNT PICTURES, INC. ET AL. District Court of Appeal, First Appellate District, of California; and

No. 613. SPARLING, SUPERINTENDENT OF BANKS, *v.* PARAMOUNT PICTURES, INC. ET AL. Supreme Court of California. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Solicitor General Perlman* for petitioner in No. 594. *Dudley T. Shearer* for petitioner in No. 613. *Homer*

I. Mitchell for Paramount Pictures, Inc.; and *Walter S. Hilborn* for the Bank of America National Trust & Savings Assn. et al., respondents. Reported below: No. 594, 93 Cal. App. 2d 768, 209 P. 2d 968.

No. 621. WADE ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Larry S. Davidow* for petitioners. *Stephen J. Roth,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 412, Misc. DANIELS ET AL. *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *O. John Rogge, Herman L. Taylor* and *C. J. Gates* for petitioners. *Harry McMullan,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 231 N. C. 17, 341, 509, 56 S. E. 2d 2, 646, 57 S. E. 2d 653.

No. 458, Misc. BAKER *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 561. STANDARD COMMERCIAL TOBACCO CO. ET AL. *v.* SNYDER, SECRETARY OF THE TREASURY, ET AL., *ante,* p. 918;

No. 657. HOLMES ET AL. *v.* UNITED STATES ET AL., *ante,* p. 927; and

No. 666. MONOLITH PORTLAND MIDWEST CO. *v.* RECONSTRUCTION FINANCE CORP., *ante,* p. 932. The petitions for rehearing in these cases are severally denied.

No. 255, Misc. THOMPSON *v.* ROBINSON, WARDEN, 338 U. S. 950. Third petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

May 15, 1950.

Per Curiam Decisions.

No. 754. Emery Transportation Co. *v.* United States et al. Appeal from the United States District Court for the Southern District of Ohio; and

No. 755. Hoffman et al. *v.* O'Brien, Police Commissioner, et al. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motions to affirm are granted and the judgments are affirmed. *Clarence D. Todd, Dale C. Dillon* and *Harry Kasfir* for appellant in No. 754. *Julius Hallheimer* for appellants in No. 755. *Solicitor General Perlman, Daniel W. Knowlton, Albert B. Rosenbaum* and *David Axelrod* for appellees in No. 754. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Samuel A. Hirshowitz,* Assistant Attorney General, for Goldstein; and *John P. McGrath, Frank S. Hogan, Seymour B. Quel* and *Whitman Knapp* for O'Brien et al., appellees in No. 755. Reported below: No. 755, 88 F. Supp. 490.

Miscellaneous Order.

No. 478, Misc. Byers *v.* Keech, U. S. District Judge. The motion for leave to file petition for writ of mandamus is denied.

Certiorari Granted.

No. 536. Compagna et al. *v.* Hiatt, Warden. C. A. 5th Cir. Certiorari granted. Mr. Justice Clark took no part in the consideration or decision of this application. *A. Walton Nall* and *Wm. Scott Stewart* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 178 F. 2d 42.

No. 554. National Council of American-Soviet Friendship, Inc. et al. *v.* McGrath, Attorney General, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. Mr. Justice Clark took no part in the consideration or decision of this application. *Abraham J. Isserman, David Rein* and *Joseph Forer* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for respondents.

No. 635. Rogers *v.* United States;

No. 636. Blau *v.* United States; and

No. 640. Blau *v.* United States. C. A. 10th Cir. Certiorari granted. Mr. Justice Clark took no part in the consideration or decision of this application. *Samuel D. Menin* for petitioners. *Solicitor General Perlman* for the United States. Reported below: Nos. 635 and 636, 179 F. 2d 559; No. 650, 180 F. 2d 103.

No. 700. McGrath, Attorney General, et al. *v.* Kristensen. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for petitioners. *David W. Louisell* for respondent. Reported below: 86 U. S. App. D. C. 48, 179 F. 2d 796.

Certiorari Denied.

No. 570. Lord Manufacturing Co. *v.* United States. Court of Claims. Certiorari denied. *Charles A. Horsky, Ralph Hammar* and *Edward G. Howard* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Melvin Richter* for the United States. Reported below: 114 Ct. Cl. 199, 84 F. Supp. 748.

No. 709. SAFE HARBOR WATER POWER CORP. *v.* FEDERAL POWER COMMISSION. C. A. 3d Cir. Certiorari denied. *Randall J. LeBoeuf, Jr., George Ross Hull* and *John C. Kelley* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Melvin Richter, Bradford Ross, Howard E. Wahrenbrock, Reuben Goldberg* and *Bernard A. Foster, Jr.* for respondent. Reported below: 179 F. 2d 179.

No. 712. UNITED STATES *v.* MARTIN ET AL.; and

No. 715. MARTIN ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Perlman* for the United States in No. 712. *Daniel Partridge, III* and *Milton D. Campbell* for Martin et al. *Mr. Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *Wilma C. Martin* for the United States in No. 715. Reported below: 85 U. S. App. D. C. 382, 177 F. 2d 733.

No. 721. NELSON ET AL. *v.* JOHNSON, SECRETARY OF DEFENSE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claude L. Dawson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Morton Hollander* for respondents. Reported below: 86 U. S. App. D. C. 99, 180 F. 2d 386.

No. 722. WILLIS *v.* CONSOLIDATED TEXTILE CO., INC. ET AL. C. A. 2d Cir. Certiorari denied. *Emanuel Redfield* for petitioner. *Samuel S. Jennings, Jr.* for the Consolidated Textile Co., respondent. Reported below: 178 F. 2d 924.

No. 448. KAMP *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in

the consideration or decision of this application. *John J. Wilson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 84 U. S. App. D. C. 187, 176 F. 2d 618.

No. 637. BARY *v.* UNITED STATES;

No. 638. KLEINBORD *v.* UNITED STATES; and

No. 639. ROGERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Samuel D. Menin* for petitioners. *Solicitor General Perlman* for the United States. Reported below: Nos. 637 and 638, 179 F. 2d 559; No. 639, 180 F. 2d 103.

No. 730. E. B. KAISER CO. *v.* RIC-WIL COMPANY. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *George I. Haight* and *Robert R. Lockwood* for petitioner. *Harvey R. Hawgood, Arthur H. Van Horn* and *Will Freeman* for respondent. Reported below: 179 F. 2d 401.

No. 410, Misc. BALL *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 154 Tex. Cr. R. ——, 225 S. W. 2d 844.

No. 414, Misc. SEWELL *v.* CALIFORNIA. District Court of Appeal for the Fourth Appellate District of California. Certiorari denied. Petitioner *pro se*. *Fred N. Howser,* Attorney General of California, *Frank Richards* and *Gilbert Harelson,* Deputy Attorneys General, for respondent. Reported below: 95 Cal. App. 2d 850, 214 P. 2d 113.

Rehearing Denied.

No. 238. MCGEE *v.* MISSISSIPPI, 338 U. S. 805. Rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 197. MARSHALL *v.* UNITED STATES, *ante*, p. 933; and

No. 495. ANHEUSER-BUSCH, INC. *v.* DU BOIS BREWING CO., *ante*, p. 934. The petitions for rehearing are denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 724. SOUTH ET AL. *v.* PETERS, CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL., *ante*, p. 276;

No. 390, Misc. WATSON *v.* SUDDOTH ET AL., *ante*, p. 935; and

No. 417, Misc. CUBBLER *v.* NEW JERSEY, *ante*, p. 939. The petitions for rehearing in these cases are severally denied.

MAY 29, 1950.

Per Curiam Decisions.

No. 671. UNITED STATES GYPSUM CO. ET AL. *v.* UNITED STATES. Appeal from the United States District Court for the District of Columbia. *Per Curiam:* The appeal is dismissed. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Albert R. Connelly, Cranston Spray* and *Hugh Lynch, Jr.* for appellants.

No. 774. E. I. DU PONT DE NEMOURS & CO. ET AL. *v.* UNITED STATES. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. MR. JUSTICE REED is of the opinion probable jurisdiction should be noted. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Gerhard A. Gesell, Paul H. Arthur, John M. Harlan* and

Aaron Finger for appellants. *Solicitor General Perlman* for the United States. Reported below: 87 F. Supp. 962.

No. 792. GLISSMANN *v.* CITY OF OMAHA ET AL. Appeal from the Supreme Court of Nebraska. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *S. L. Winters* for appellant. *Alfred G. Ellick* for appellees. Reported below: 151 Neb. 895, 39 N. W. 2d 828.

Miscellaneous Orders.

No. 670. UNITED STATES *v.* UNITED STATES GYPSUM CO. ET AL. Appeal from the United States District Court for the District of Columbia. In this case probable jurisdiction is noted. The motions to supplement the record are granted. Article III of the decree of the District Court of November 7, 1949, reading as follows: "The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act," is affirmed. The corporate defendants and Samuel M. Gloyd, doing business as Texas Cement Plaster Company, are enjoined, pending further order of this Court, from (1) enforcing in any manner whatsoever the provisions of their current license agreements fixing, maintaining, or stabilizing prices of gypsum board or the terms and conditions of sale thereof, and (2) from entering into or performing any agreement or understanding in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain, or stabilize prices of gypsum board or by license or other concerted action arranging the terms and conditions of sale thereof. MR. JUSTICE JACKSON and

MR. JUSTICE CLARK took no part in the consideration or decision of these questions.

No. 682. COMMISSIONER OF INTERNAL REVENUE *v.* McKAY PRODUCTS CORP. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit dismissed on motion of counsel for the petitioner. *Solicitor General Perlman* for petitioner. *Karl F. Steinmann* and *John W. Cable, III* for respondent. Reported below: 178 F. 2d 639.

No. 420, Misc. ODDO *v.* NEW YORK. Court of Appeals of New York. Motion of Dominic Mundo to join in the petition denied. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Whitman Knapp* for respondent. Reported below: 300 N. Y. 649, 90 N. E. 2d 896.

No. 469, Misc. PORTER *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. Motion for leave to file petition for writ of mandamus also denied.

No. 479, Misc. PARDEE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. Reported below: 327 Mich. 13, 41 N. W. 2d 466.

No. 511, Misc. GIBBS *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Petition for appeal also denied.

No. 467, Misc. 4278 HAZEL BUILDING CORP. ET AL. *v.* BEREST ET AL.;

No. 477, Misc. FARNSWORTH *v.* FOSTER, WARDEN; and

No. 499, Misc. GRANT *v.* OVERHOLSER. Motion for leave to file petitions for writs of certiorari denied. *Meyer*

Abrams and *William Henning Rubin* for petitioners in No. 467, Misc. Petitioners *pro se* in Misc. Nos. 477 and 499. *Robert Marks* and *M. J. Myer* for respondents in No. 467. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Herman N. Harcourt* and *George A. Radz,* Assistant Attorneys General, for respondent in No. 477, Misc.

No. 486, Misc. HACKWORTH *v.* HIATT, WARDEN;

No. 489, Misc. LOWE *v.* HUMPHREY, WARDEN; and

No. 506, Misc. LEDER *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 490, Misc. RASH *v.* MEMBERS OF BOARD OF TRUSTEES OF INDIANA STATE PRISON; and

No. 503, Misc. DAVISON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted.

No. 703. ACKERMANN *v.* UNITED STATES; and

No. 704. ACKERMANN *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *E. M. Grimes* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: No. 703, 178 F. 2d 983; No. 704, 179 F. 2d 236.

No. 723. UNIVERSAL CAMERA CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari granted. *James S. Hays* for petitioner. *Solicitor General Perlman, Robert N. Denham, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 179 F. 2d 749.

No. 421, Misc. FEINER *v.* NEW YORK. Court of Appeals of New York. Certiorari granted. Reported below: 300 N. Y. 391, 91 N. E. 2d 316.

Certiorari Denied. (*See also Misc. Nos. 420, 467, 469, 477, 479, 499 and 511, supra.*)

No. 701. La Salle Steel Co. *v.* National Labor Relations Board. C. A. 7th Cir. Certiorari denied. *Henry E. Seyfarth* for petitioner. *Solicitor General Perlman, Stanley M. Silverberg, Robert N. Denham, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 178 F. 2d 829.

No. 702. Seaboard & Western Airlines, Inc. *v.* Civil Aeronautics Board et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Hardy K. Maclay* for petitioner. *Solicitor General Perlman, Assistant Attorney General Bergson, Stanley M. Silverberg, J. Roger Wollenberg, Emory T. Nunneley, Jr.* and *Warren L. Sharfman* for the Civil Aeronautics Board, respondent. Reported below: 86 U. S. App. D. C. 64, 181 F. 2d 515.

No. 708. Five Cases of Figlia Mia Brand of Oil et al. *v.* United States. C. A. 2d Cir. Certiorari denied. *Chester A. Lessler* for the Antonio Corrao Corporation, petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Stanley M. Silverberg, Robert S. Erdahl, Vincent A. Kleinfeld* and *John T. Grigsby* for the United States. Reported below: 179 F. 2d 519.

No. 711. Beets *v.* Hunter, Warden. C. A. 10th Cir. Certiorari denied. *Howard F. McCue* and *Walton Stanley Allen* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 180 F. 2d 101.

No. 716. Henderson *v.* United States;
No. 717. Wildman *v.* United States;
No. 718. Shufflebarger *v.* United States; and
No. 719. Frantz *v.* United States. C. A. 7th Cir. Certiorari denied. *John W. MacDonald* for petitioners.

Solicitor General Perlman, Assistant Attorney General McInerney, Philip R. Monahan and *Felicia H. Dubrovsky* for the United States. Reported below: 180 F. 2d 711.

No. 720. KING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ben F. Foster* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for the United States. Reported below: 178 F. 2d 320.

No. 728. UNION BLEACHERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Leonard Marshall* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *Frank J. Ready* for the United States. Reported below: 176 F. 2d 517.

No. 735. MARX ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. *Emily Marx* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for respondent. Reported below: 179 F. 2d 938.

No. 736. GIVENS *v.* MOLL ET AL. C. A. 5th Cir. Certiorari denied. *Henry C. Vosbein* for petitioner. Reported below: 177 F. 2d 765.

No. 737. YATES *v.* BALL. Supreme Court of Florida. Certiorari denied. *Robert H. Anderson* and *Harry T. Gray* for petitioner. *Henry P. Adair* and *Wm. H. Rogers* for respondent. Reported below: 44 So. 2d 302.

No. 739. ELLIS, RECEIVER, *v.* CATES. C. A. 4th Cir. Certiorari denied. *John Locke Green* for petitioner. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *Fred W. Smith* for respondent. Reported below: 178 F. 2d 791.

No. 741. ANDERSON ET AL., TRUSTEES, *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John H. Crooker, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 179 F. 2d 281.

No. 742. THE ARLINGTON, INC. ET AL. *v.* MAYER. C. A. 7th Cir. Certiorari denied. *Meyer Abrams* for petitioners. *Cassius M. Doty* for respondent.

No. 744. CURTIS, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Samuel T. Gaines* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *A. F. Prescott* for the United States. Reported below: 178 F. 2d 268.

No. 747. MAGIDSON *v.* DUGGAN, TRUSTEE, ET AL. C. A. 8th Cir. Certiorari denied. *James C. Jones, Jr.* for petitioner. *Geo. O. Durham* for respondents. Reported below: 180 F. 2d 473.

No. 752. DUNAWAY ET AL. *v.* STANDARD OIL CO. (NEW JERSEY) ET AL. C. A. 5th Cir. Certiorari denied. *Arthur H. Bartelt* for petitioners. *Robert H. Kelley* for the Standard Oil Co.; *Wm. A. Dougherty, James Lawrence White* and *Wm. Q. Boyce* for the Colorado Interstate Gas Co.; and *Wales H. Madden* for the Southwestern Development Co., respondents. Reported below: 178 F. 2d 884.

No. 753. GEORGE *v.* LEONARD ET AL. C. A. 4th Cir. Certiorari denied. *Warren E. Miller* and *R. K. Wise* for petitioner. *David W. Robinson* for respondents. Reported below: 178 F. 2d 312.

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No. 757. SIMON ET AL., EXECUTORS, *v.* HOEY, EXECUTRIX. C. A. 2d Cir. Certiorari denied. *Clifton P. Williamson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *Harry Baum* for respondent. Reported below: 180 F. 2d 354.

No. 758. CARTER ET AL., EXECUTORS, *v.* HOEY, EXECUTRIX, ET AL. C. A. 2d Cir. Certiorari denied. *Clifton P. Williamson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *Harry Baum* for respondents. Reported below: 180 F. 2d 353.

No. 767. HYMAN *v.* VELSICOL CORPORATION. Supreme Court of Illinois. Certiorari denied. *Thurman Arnold* for petitioner. *Floyd E. Thompson* and *Clyde E. Shorey* for respondent. Reported below: 405 Ill. 352, 90 N. E. 2d 717.

No. 770. MCGARTY *v.* O'BRIEN, WARDEN. C. A. 1st Cir. Certiorari denied. *William C. Crossley* for petitioner. *Francis E. Kelly,* Attorney General of Massachusetts, and *Henry P. Fielding* and *Lawrence E. Ryan,* Assistant Attorneys General, for respondent. Reported below: 180 F. 2d 987.

No. 777. BROOKS, ADMINISTRATRIX, *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. C. A. 8th Cir. Certiorari denied. *Phil W. Davis, Jr.* and *Chelsea O. Inman* for petitioner. *James L. Homire, C. H. Skinker, Jr.* and *W. W. Dalton* for respondent. Reported below: 180 F. 2d 185.

No. 803. COMMISSIONER OF INTERNAL REVENUE *v.* BASALT ROCK CO., INC. C. A. 9th Cir. Certiorari denied.

Solicitor General Perlman for petitioner. *Francis R. Kirkham, Sigvald Nielson* and *Harry R. Horrow* for respondent. Reported below: 180 F. 2d 281.

No. 804. COMMISSIONER OF INTERNAL REVENUE *v.* BUSCH'S KREDIT JEWELRY CO., INC. C. A. 2d Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Robert G. MacAlister* for respondent. Reported below: 179 F. 2d 298.

No. 805. COMMISSIONER OF INTERNAL REVENUE *v.* JOHN BREUNER CO. C. A. 9th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Roy A. Bronson* for respondent. Reported below: 179 F. 2d 685.

No. 734. ALLTMONT ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Abraham E. Freedman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for respondents. Reported below: 177 F. 2d 971.

No. 289, Misc. SHAW ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 320, Misc. ST. CLAIR *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondent.

No. 323, Misc. WALEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 178 F. 2d 311.

No. 330, Misc. MCINTOSH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 176 F. 2d 514.

No. 332, Misc. SIMMONS *v.* HUNTER, WARDEN; and
No. 350, Misc. McMAHAN *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. *Howard F. McCue* for petitioner in No. 332, Misc. *Charles E. Dierker* for petitioner in No. 350, Misc. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for respondent. Reported below: No. 332, Misc., 179 F. 2d 664; No. 350, Misc., 179 F. 2d 661.

No. 339, Misc. SPENCER *v.* RIDGE, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied.

No. 340, Misc. THOMPSON *v.* RAGEN, WARDEN;
No. 341, Misc. SHERMAN *v.* RAGEN, WARDEN; and
No. 342, Misc. LEWIS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 349, Misc. DAVISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 353, Misc. DARMAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Herman N. Harcourt* and *George A. Radz,* Assistant Attorneys General, for respondent.

No. 357, Misc. BARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 178 F. 2d 803.

No. 379, Misc. JACKSON *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 179 F. 2d 680.

No. 384, Misc. SMITH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 399, Misc. PINE *v.* BOYLE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph A. McMenamin* for petitioner.

No. 411, Misc. LOWREY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Albert Bernhard De Salardi* for petitioner. Reported below: 179 F. 2d 964.

No. 416, Misc. BURSON *v.* ALVIS, WARDEN. Supreme Court of Ohio. Certiorari denied. *James N. Linton* and *Henry J. Linton* for petitioner. Reported below: 152 Ohio St. 375, 89 N. E. 2d 651.

No. 418, Misc. BALDWIN *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 177 F. 2d 147.

No. 423, Misc. AHEARN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Whitman Knapp* for respondent.

No. 431, Misc. KRONBERG *v.* HALE ET AL. C. A. 9th Cir. Certiorari denied. *William Farnum White* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for respondents. Reported below: 180 F. 2d 128.

No. 436, Misc. BANKS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 453, Misc. MORTON *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 179 F. 2d 956.

No. 456, Misc. EKBERG *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 462, Misc. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 472, Misc. MARSHALL *v.* INDIANA. Circuit Court of Randolph County, Indiana. Certiorari denied.

No. 474, Misc. LOOMIS *v.* EDWARDS, JUDGE. Court of Appeals of Georgia. Certiorari denied. *Homer L. Loomis* for petitioner. Reported below: 80 Ga. App. 396, 56 S. E. 2d 183.

No. 475, Misc. PETREK *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 480, Misc. DUTY *v.* ROBINSON, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 482, Misc. HENRY *v.* BALDI, SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 483, Misc. HOVIS *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 485, Misc. CREBS *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 487, Misc. JOHNSON *v.* INDIANA. Criminal Court of Lake County, Indiana. Certiorari denied.

No. 488, Misc. CAMPBELL *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 492, Misc. KEITH *v.* WYOMING. Supreme Court of Wyoming. Certiorari denied.

No. 493, Misc. BLAKSLEY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 494, Misc. WALSHFER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 495, Misc. HARRIS *v.* ROBINSON, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 496, Misc. MORANDA *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 500, Misc. McMORRIS *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 505, Misc. VACCARO *v.* NEW YORK. County Court of Manhattan County, New York. Certiorari denied.

No. 507, Misc. CARROLL *v.* SWENSON, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 508, Misc. HOLIDAY *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 510, Misc. STEPHENSON *v.* PAGE, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 513, Misc. DUFFY *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 516, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 766, October Term, 1947. BARSKY ET AL. *v.* UNITED STATES, 334 U. S. 843. The petitions for rehear-

ing are denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petitions should be granted. MR. JUSTICE BURTON and MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 173. UNITED STATES ET AL. *v.* UNITED STATES SMELTING REFINING & MINING CO. ET AL., *ante*, p. 186. The petitions for rehearing are denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 248. LAWSON *v.* UNITED STATES; and

No. 249. TRUMBO *v.* UNITED STATES, *ante*, p. 934. Rehearing denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 490. UNITED STATES *v.* COTTON VALLEY OPERATORS COMMITTEE ET AL., *ante*, p. 940. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 661. COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF MASSACHUSETTS *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., *ante*, p. 943. Rehearing denied.

No. 205, Misc. DAYTON *v.* HUNTER, WARDEN, 338 U. S. 888. Second petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 324, Misc. LOWE *v.* KILLINGER ET AL., *ante*, p. 949. Rehearing denied.

No. 331, Misc. BAUMET *v.* UNITED STATES ET AL., *ante*, p. 923;

No. 378, Misc. VERMILLION *v.* MEYER ET AL., *ante*, p. 915; and

No. 391, Misc. ROWE *v.* GREEN, *ante*, p. 935. The motions for leave to file petitions for rehearing are denied.

No. 455, Misc. SPILLMANN *v.* JACKSON, WARDEN, *ante*, p. 941. Rehearing denied.

JUNE 5, 1950.

Per Curiam Decisions.

No. 814. FELMAN *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Samuel E. Hirsch* for appellant. *Solicitor General Perlman* and *Benedict P. Cottone* for appellees.

No. 824. CONSOLIDATED EDISON CO. *v.* MALTBIE ET AL. Appeal from the Supreme Court of Albany County, New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Jacob H. Goetz* and *Richard Joyce Smith* for appellant. *George H. Kenny* for appellees. Reported below: See 300 N. Y. 196, 645, 90 N. E. 2d 35, 498.

No. 838. SERNA *v.* WALTERS, WARDEN. Appeal from the Supreme Court of Arizona. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Marshall W. Haislip* for petitioner.

No. 844. LOEW'S, INC. *v.* UNITED STATES;

No. 845. WARNER BROS. PICTURES, INC. ET AL. *v.* UNITED STATES;

No. 846. TWENTIETH CENTURY-FOX FILM CORP. ET AL. *v.* UNITED STATES; and

No. 847. UNITED STATES *v.* LOEW'S, INC. ET AL. Appeals from the United States District Court for the Southern District of New York. *Per Curiam:* The judgment is affirmed. MR. JUSTICE REED and MR. JUSTICE BURTON are of the opinion that probable jurisdiction should be noted and the cases set down for argument. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of these cases. *John W. Davis, J. Robert Rubin* and *S. Hazard Gillespie, Jr.* for appellant in No. 844. *Joseph M. Proskauer* and *Robert W. Perkins* for Warner Bros. Pictures, Inc. et al., appellants in No. 845. *James F. Byrnes, Otto E. Koegel, John F. Caskey* and *Frederick W. R. Pride* for Twentieth Century-Fox Film Corp. et al., appellants in No. 846. *Solicitor General Perlman* for the United States, appellant in No. 847. Reported below: See 70 F. Supp. 53.

No. 453. SHOONG ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Commissioner v. Korell,* decided this day, *ante,* p. 619. MR. JUSTICE BLACK dissents. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Nat Schmulowitz* and *Peter S. Sommer* for petitioners. *Solicitor General Perlman* for respondent. Reported below: 177 F. 2d 131.

No. 795. PRICHARD *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR.

JUSTICE CLARK have disqualified themselves in this case. Because of this absence of a quorum, 28 U. S. C. § 1, and since a majority of the qualified justices are of the opinion that the case cannot be heard and determined at the next term of Court, the judgment of the Court of Appeals is affirmed under 28 U. S. C. § 2109, which provides that under these circumstances "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." *Hugh B. Cox, Leslie W. Morris* and *Henry T. Duncan* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 181 F. 2d 326.

Miscellaneous Orders.

No. 10, Original. GEORGIA *v.* PENNSYLVANIA RAILROAD CO. ET AL. Upon submission of the report of the Special Master herein it is ordered that it be received and filed. Exceptions and objections of the parties, if any, shall be filed within ninety days thereafter.

No. 11, Original. UNITED STATES *v.* CALIFORNIA. The motion of Harold L. Ickes for leave to file suggestions is denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Harold L. Ickes, pro se.*

No. 107. STANDARD OIL CO. *v.* FEDERAL TRADE COMMISSION. This case is ordered restored to the docket for reargument.

No. 491, Misc. MADSEN *v.* JOHNSON ET AL. Motion for leave to file petition for writ of habeas corpus denied. *Dayton M. Harrington* and *Joseph S. Robinson* for petitioner.

No. 523, Misc. SWAIN *v.* DUFFY, WARDEN;
No. 526, Misc. MOSS *v.* STEELE, WARDEN;
No. 532, Misc. FLEET *v.* SWENSON, WARDEN;
No. 533, Misc. BRIDGES *v.* RAGEN, WARDEN;
No. 539, Misc. CASTLEMAN *v.* OVERHOLSER;
No. 540, Misc. WILLIAMS *v.* OVERHOLSER; and
No. 547, Misc. PAQUETTE *v.* ILLINOIS. The motions for leave to file petitions for writs of habeas corpus in these cases are severally denied.

No. 433, Misc. IN RE HANS;
No. 434, Misc. IN RE SCHMIDT; and
No. 484, Misc. LAMMERS *v.* UNITED STATES. The motions for leave to file petitions for writs of habeas corpus are denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS vote to deny without prejudice to making applications in a District Court. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 497, Misc. BYERS *v.* UNITED STATES ET AL. Motions for leave to file petitions for writs of certiorari and mandamus denied.

No. 524, Misc. CHANDLER *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA;
No. 546, Misc. CHAPMAN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA; and
No. 548, Misc. WALSHFER *v.* MICHIGAN. The motions for leave to file petitions for writs of mandamus are severally denied.

No. 527, Misc. KADANS *v.* COLEMAN. Motion for leave to file petition for writ of injunction denied.

No. 568, Misc. TILLMAN *v.* FLORIDA. The motion for a stay of execution is denied. *P. Guy Crews* for petitioner.

Certiorari Granted. (*See also No. 453, supra.*)

Nos. 663 and 664. STANDARD OIL COMPANY OF NEW JERSEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Edwin S. Murphy* and *Ira A. Campbell* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Leavenworth Colby* for the United States. Reported below: 178 F. 2d 488.

No. 710. LIBBY, MCNEILL & LIBBY *v.* UNITED STATES. Court of Claims. Certiorari granted. *Edward G. Dobrin* and *Stanley B. Long* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Leavenworth Colby* for the United States. Reported below: 115 Ct. Cl. 290, 87 F. Supp. 866.

No. 766. BAILEY *v.* RICHARDSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Thurman Arnold, Abe Fortas, Paul A. Porter* and *Milton V. Freeman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for respondents. Reported below: 86 U. S. App. D. C. 251, 182 F. 2d 46.

No. 429, Misc. WHELCHEL *v.* MCDONALD, WARDEN. C. A. 5th Cir. Certiorari granted. *Hugh Carney* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Philip R. Monahan* and *Robert G. Maysack* for respondent. Reported below: 178 F. 2d 760.

No. 545, Misc. GUSIK *v.* SCHILDER, WARDEN. C. A. 6th Cir. Certiorari granted. *Morris Morgenstern, Bernard B. Direnfeld, Leo Chimo, Francis Picklow* and *Marvin L. Shaw* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 180 F. 2d 662.

Certiorari Denied. (*See also No. 838 and Misc. No. 497, supra.*)

No. 647. UNITED STATES *v.* EAST SIDE CANAL & IRRIGATION CO. ET AL. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *Edward F. Treadwell* for respondents. Reported below: 115 Ct. Cl. 47.

No. 705. HENJES ET AL., EXECUTORS, ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Edmund F. Lamb* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, John R. Benney* and *Samuel D. Slade* for the United States. Reported below: 115 Ct. Cl. 264, 87 F. Supp. 780.

No. 740. SIMONSEN *v.* EMMERLING, TRUSTEE;
No. 761. EMMERLING, TRUSTEE, *v.* SCHROEDER; and
No. 762. EMMERLING, TRUSTEE, *v.* SCHROEDER ET AL. C. A. 7th Cir. Certiorari denied. *Max E. Geline* for petitioner in No. 740. *Jackson M. Bruce* for petitioner in Nos. 761 and 762 and respondent in No. 740. *Ralph M. Hoyt* for respondents in Nos. 761 and 762. *Solicitor General Perlman, Roger S. Foster, David Ferber* and *W. Victor Rodin* filed a memorandum for the Securities & Exchange Commission supporting the petitioner in Nos. 761 and 762 and respondent in No. 740. Reported below: 178 F. 2d 805.

No. 743. UNITED STATES *v.* KNIGHT. C. A. 3d Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Robert T. McCracken, George G. Chandler* and *J. Julius Levy* for respondent. Reported below: 180 F. 2d 55.

No. 745. MAHANA *v.* UNITED STATES. Court of Claims. Certiorari denied. *Henry Woog* for petitioner.

Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner and *Elizabeth B. Davis* for the United States. Reported below: 115 Ct. Cl. 716, 88 F. Supp. 285.

No. 756. SEAVEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Thomas D. McBride* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for the United States. Reported below: 180 F. 2d 837.

No. 760. IOWA ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. *Robert L. Larson* and *Neill Garrett* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Melvin Richter, Bradford Ross* and *Willard W. Gatchell* for the Federal Power Commission; and *Andrew G. Haley, James A. McKenna, Jr., Vernon L. Wilkinson* and *David W. Robinson, Jr.* for the First Iowa Hydro-Electric Cooperative, respondents. Reported below: 178 F. 2d 421.

No. 763. DE BOTHEZAT IMPELLER CO., INC. *v.* AMERICAN MACHINE & METALS, INC. C. A. 2d Cir. Certiorari denied. *Samuel Williston, Chester B. McLaughlin* and *Watson Washburn* for petitioner. *Leonard P. Moore* and *Charles Pickett* for respondent. Reported below: 180 F. 2d 342.

No. 764. SHAFER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Arthur E. T. Chapman* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 179 F. 2d 929.

No. 765. MONTMARQUET, DOING BUSINESS AS O. C. MANUFACTURING CO., *v.* JOHNSON & JOHNSON. C. A. 3d

Cir. Certiorari denied. *Morris Kirschstein* for petitioner. *William J. Barnes, Kenneth Perry* and *Benton A. Bull* for respondent. Reported below: 179 F. 2d 240.

No. 769. MURRAY *v.* WEDEMEYER, COMMANDING GENERAL. C. A. 9th Cir. Certiorari denied. *Gilbert S. Woolworth* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 179 F. 2d 963.

No. 776. VICTOR ET AL. *v.* HILLEBRECHT ET AL. Supreme Court of Illinois. Certiorari denied. *Meyer Abrams* for petitioners. *Frank H. Towner* and *Henry I. Green* for respondents. Reported below: 405 Ill. 264, 90 N. E. 2d 751.

No. 779. HUNTINGTON PALISADES PROPERTY OWNERS CORP., LTD. *v.* METROPOLITAN FINANCE CORP. C. A. 9th Cir. Certiorari denied. *Paul R. Smith* for petitioner. *Henry Schaefer, Jr.* and *Raymond V. Haun* for respondent. Reported below: 180 F. 2d 132.

No. 783. JACKSON *v.* RUTHAZER, WARDEN. C. A. 2d Cir. Certiorari denied. *Curtis F. McClane* for petitioner. *Frank S. Hogan* and *Whitman Knapp* for respondent. Reported below: 181 F. 2d 588.

No. 784. MAHON *v.* BENNETT, DOING BUSINESS AS GEORGE BENNETT CONSTRUCTION CO., ET AL. C. A. 8th Cir. Certiorari denied. *Homer S. Cummings, Dick H. Woods* and *Paul R. Stinson* for petitioner. *Charles M. Miller* and *Herman M. Langworthy* for respondents. Reported below: 180 F. 2d 224.

No. 791. FIREMEN'S INSURANCE CO. *v.* SMITH ET AL. C. A. 8th Cir. Certiorari denied. *Donald N. Clausen* and *Herbert W. Hirsh* for petitioner. *Ferd J. Frankenhoff* for respondents. Reported below: 180 F. 2d 371.

No. 793. MOODY *v.* EDMONDSTON, ADMINISTRATOR. C. A. 6th Cir. Certiorari denied. *L. E. Gwinn* for petitioner. *Sam Costen* for respondent.

No. 794. RICHARDSON, TRUSTEE, *v.* NATIONAL ACCEPTANCE CO C. A. 7th Cir. Certiorari denied. *Eli F. Seebirt* for petitioner. *Harold J. Finder* for respondent. Reported below: 179 F. 2d 1.

No. 796. HUDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *C. T. Graydon* for petitioner. Reported below: 180 F. 2d 630.

No. 800. LYNCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *C. Ballard Harrison* for petitioner. Reported below: 180 F. 2d 696.

No. 823. PILSON *v.* SALVONI. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward Stafford* for petitioner. *Lawrence Cake* for respondent. Reported below: 86 U. S. App. D. C. 229, 181 F. 2d 615.

No. 828. WIXOM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Francis Heisler* and *Irwin J. Askow* for petitioner. *Solicitor General Perlman* for the United States.

No. 841. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Oldham Clarke* and *A. Shelby Winstead* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 179 F. 2d 842.

No. 402. DORSEY ET AL. *v.* STUYVESANT TOWN CORPORATION ET AL. Court of Appeals of New York. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Will*

Maslow, Charles Abrams, Thurgood Marshall, Shad Polier and *Joseph B. Robison* for petitioners. *Churchill Rodgers, Samuel Seabury, C. Frank Reavis, Jeremiah M. Evarts* and *George Trosk* for respondents. Reported below: 299 N. Y. 512, 87 N. E. 2d 541.

No. 579. UNITED STATES *v.* IOWA-WISCONSIN BRIDGE CO. ET AL. Court of Claims. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE REED are of the opinion certiorari should be granted. *Solicitor General Perlman* for the United States. *Fred A. Ontjes* for respondents. Reported below: 114 Ct. Cl. 464, 84 F. Supp. 852.

No. 759. LEVINE *v.* BERMAN ET AL., DOING BUSINESS AS DAVID H. BERMAN CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MINTON took no part in the consideration or decision of this application. *Jack Wasserman* and *William Henning Rubin* for petitioner. *Benjamin F. Morrison* for respondents. Reported below: 178 F. 2d 440.

Nos. 771, 772 and 773. PRATT ET AL. *v.* DE KORWIN, EXECUTRIX;

No. 789. DE KORWIN, EXECUTRIX, ET AL. *v.* FIRST NATIONAL BANK OF CHICAGO ET AL.; and

No. 790. KOCH *v.* DE KORWIN, EXECUTRIX, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MINTON took no part in the consideration or decision of these applications. *David A. Watts* for Pratt et al., petitioners in Nos. 771, 772 and 773, and respondents in No. 789. *Charles Rivers Aiken, Vernon R. Loucks, Thomas Dodd Healy, Harold Stickler* and *Joseph E. Casey* for petitioners in No. 789, and *Mr. Aiken, Mr. Loucks* and *Mr. Casey* for respondents in Nos. 771, 772, 773 and 790. *Cranston Spray* for petitioner in No. 790. *Edward R. Johnston, J. F. Dammann, Harold V. Amberg* and *John W. Kearns*

for the First National Bank of Chicago, respondent in No. 789. Reported below: 179 F. 2d 147, 347.

No. 775. General Steel Castings Corp. et al. *v.* Kroese. C. A. 3d Cir. Certiorari denied. Mr. Justice Minton took no part in the consideration or decision of this application. *Robert P. Patterson* and *William Clarke Mason* for petitioners. *Morris L. Forer* for respondent. Reported below: 179 F. 2d 760.

No. 778. Madsen *v.* Johnson, Secretary of Defense, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Dayton M. Harrington* and *Joseph S. Robinson* for petitioner. *Solicitor General Perlman* for respondents.

No. 780. Drury *v.* Hurley et al., Civil Service Commissioners of Chicago; and

No. 781. Connelly *v.* Hurley et al., Civil Service Commissioners of Chicago. Appellate Court for the First District of Illinois. Certiorari denied. *Ode L. Rankin* for petitioners. *L. Louis Karton* and *Sydney R. Drebin* for respondents. Reported below: No. 780, 339 Ill. App. 33, 88 N. E. 2d 728, and No. 781, 339 Ill. App. 54, 88 N. E. 2d 736.

No. 788. Eichenlaub *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of this application. *George G. Shiya* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Israel Convisser* for the United States. Reported below: 180 F. 2d 314.

No. 802. Meyers *v.* United States et al. United States Court of Appeals for the District of Columbia

Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Stanley Suydam* and *John O. Dahlgren* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Philip R. Monahan* for respondents. Reported below: 86 U. S. App. D. C. 323, 181 F. 2d 802.

No. 48, Misc. MCCLANNAHAN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. Petitioner *pro se*. *Stephen J. Roth,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondent.

No. 190, Misc. MELANSON *v.* MASSACHUSETTS;
No. 192, Misc. BLONDIN *v.* MASSACHUSETTS; and
No. 194, Misc. MORIN *v.* MASSACHUSETTS. Superior Court of Berkshire County, Massachusetts. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petitions should be granted. *William S. Kenney* for petitioners. *Francis E. Kelly,* Attorney General of Massachusetts, and *Henry P. Fielding,* Assistant Attorney General, for respondent. Reported below: See 324 Mass. 564, 87 N. E. 2d 455.

No. 191, Misc. MELANSON *v.* MASSACHUSETTS;
No. 193, Misc. BLONDIN *v.* MASSACHUSETTS; and
No. 195, Misc. MORIN *v.* MASSACHUSETTS. Supreme Judicial Court of Suffolk County, Massachusetts. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petitions should be granted. *William S. Kenney* for petitioners. *Francis E. Kelly,* Attorney General of Massachusetts, and *Henry P. Fielding,* Assistant Attorney General, for respondent. Reported below: 324 Mass. 564, 87 N. E. 2d 455.

No. 233, Misc. EVANS *v.* ROBINSON, WARDEN. Circuit Court of St. Clair County, Illinois. Certiorari denied. Petitioner *pro se.* *Ivan A. Elliott,* Attorney General of Illinois, and *William C. Wines* and *James C. Murray,* Assistant Attorneys General, for respondent.

No. 236, Misc. SANDERS *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for respondent. Reported below: 176 F. 2d 311.

No. 244, Misc. ALRED *v.* BENNETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 177 F. 2d 148.

No. 334, Misc. HART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 178 F. 2d 357.

No. 359, Misc. DAWSON *v.* UNITED STATES; and

No. 370, Misc. NEMEC *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner in No. 359, Misc. Petitioner *pro se* in No. 370, Misc. *Solicitor General Perlman, Assistant Attorney General McInerney, Philip R. Monahan* and *Robert G. Maysack* for the United States. Reported below: 178 F. 2d 656.

No. 372, Misc. PRICE *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for respondent. Reported below: 178 F. 2d 273.

No. 375, Misc. SYMONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner.

Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl and *Robert G. Maysack* for the United States. Reported below: 178 F. 2d 615.

No. 415, Misc. POWERS *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondent. Reported below: 178 F. 2d 141.

No. 445, Misc. SCHMIDT, ADMINISTRATRIX, ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *J. Sidney Nye* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 179 F. 2d 724.

No. 446, Misc. FITZHUGH *v.* ALABAMA. Court of Appeals of Alabama. Certiorari denied. *Ben F. Ray* for petitioner. *Albert A. Carmichael,* Attorney General of Alabama, and *Lee Edward Barton,* Assistant Attorney General, for respondent. Reported below: 35 Ala. App. ——, 43 So. 2d 831.

No. 460, Misc. STURM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 180 F. 2d 413.

No. 466, Misc. YOUNG *v.* NEW YORK CENTRAL RAILROAD CO. Court of Appeals of Cuyahoga County, Ohio. Certiorari denied. *Harry F. Payer* for petitioner. *J. Paul Lamb* for respondent. Reported below: 88 N. E. 2d 220.

No. 476, Misc. MILLS *v.* BALDI, SUPERINTENDENT. Superior Court of Pennsylvania and Supreme Court of Pennsylvania. Certiorari denied. *Samuel A. Neuburger* for petitioner. *James W. Tracey, Jr.* and *John H. Maurer* for respondent.

No. 501, Misc. GOODALL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Alfred Goldstein* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Israel Convisser* for the United States. Reported below: 86 U. S. App. D. C. 149, 180 F. 2d 397.

No. 502, Misc. LAMORA *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Jerome Goldman* for petitioner. *Carson Hoy* for respondent. Reported below: 153 Ohio St. 290, 91 N. E. 2d 23.

No. 504, Misc. LICZNERSKI *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. *Milford J. Meyer* for petitioner. *Solicitor General Perlman* filed a memorandum for the United States, respondent, stating that the Government in effect occupies the role of a stakeholder and takes no position as to whether the writ of certiorari should issue. *John Patrick Walsh* for Rickards, respondent. Reported below: 180 F. 2d 862.

No. 509, Misc. ODEN *v.* HILL, WARDEN. Supreme Court of Utah. Certiorari denied.

No. 512, Misc. MOORE *v.* SHUTTLEWORTH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 180 F. 2d 889.

No. 514, Misc. BURCHFIELD *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondent. Reported below: 179 F. 2d 679.

No. 515, Misc. BYERS *v.* TEMPLE. United States Court of Appeals for the District of Columbia Circuit.

Certiorari denied. *I. H. Halpern* for petitioner. *Frank D. Reeves* for respondent.

No. 517, Misc. KRAUSE *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 181 F. 2d 93.

No. 518, Misc. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 180 F. 2d 1020.

No. 519, Misc. VANCE *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *William A. McTighe* for petitioner. *Roy H. Beeler,* Attorney General of Tennessee, and *Nat Tipton* for respondent. Reported below: 190 Tenn. —, 230 S. W. 2d 987.

No. 520, Misc. LOWE *v.* HUMPHREY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 521, Misc. SKINNER *v.* NEW YORK CENTRAL RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari denied.

No. 522, Misc. MASTERSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 525, Misc. BLAND *v.* ELLIS, MANAGER OF THE TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied. *Bowen C. Tatum* for petitioner. *Joe R. Greenhill,* First Assistant Attorney General of Texas, for respondent. Reported below: 154 Tex. Cr. R. —, 228 S. W. 2d 170.

No. 528, Misc. REED *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 529, Misc. GAGNON *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Reported below: 230 Minn. 582, 41 N. W. 2d 579.

No. 530, Misc. DAVIS *v.* SMYTH, SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 531, Misc. STEPHENSON *v.* PAGE, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 534, Misc. SPRUILL *v.* BROOKS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 535, Misc. LOGAN *v.* HARTY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *I. H. Halpern* for petitioner. *Emory B. Smith* for respondent.

No. 536, Misc. HARRIS *v.* ILLINOIS. Circuit Court of Sangamon County, Illinois. Certiorari denied.

No. 537, Misc. WILKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 181 F. 2d 495.

No. 538, Misc. HAMPTON ET AL. *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Martin A. Martin* for petitioners. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, for respondent. Reported below: 190 Va. 531, 58 S. E. 2d 288.

No. 541, Misc. KEMMERER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 542, Misc. KEITH *v.* MILLER, WARDEN. Supreme Court of Wyoming. Certiorari denied.

No. 543, Misc. DI SILVESTRO *v.* UNITED STATES VETERANS' ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondent. Reported below: 181 F. 2d 502.

No. 544, Misc. ROHDE *v.* O'DONNELL, ACTING DIRECTOR. Supreme Court of Illinois. Certiorari denied.

No. 549, Misc. SPENCER *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 550, Misc. SIEGEL ET AL. *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. *Julian C. Ryer* for petitioners. Reported below: 180 F. 2d 785.

No. 551, Misc. SMITH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 552, Misc. O'HARA *v.* BURFORD, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 181 F. 2d 96.

No. 559, Misc. SAMPSELL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 34 Cal. 2d 757, 214 P. 2d 813.

Rehearing Denied.

No. 10. AMERICAN COMMUNICATIONS ASSN., C. I. O., ET AL. *v.* DOUDS, REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, *ante*, p. 382. Rehearing denied. MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK and MR. JUSTICE MINTON took no part in the consideration or decision of these applications.

No. 13. UNITED STEELWORKERS OF AMERICA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 382. Rehearing denied. MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK and MR. JUSTICE MINTON took no part in the consideration or decision of this application.

No. 98. UNITED STATES *v.* FLEISCHMAN, *ante*, p. 349; and

No. 99. UNITED STATES *v.* BRYAN, *ante*, p. 323. Rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 309. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC. UNION, LOCAL 309, ET AL. *v.* HANKE ET AL., DOING BUSINESS AS ATLAS AUTO REBUILD; and

No. 364. AUTOMOBILE DRIVERS & DEMONSTRATORS LOCAL UNION NO. 882 ET AL. *v.* CLINE, *ante*, p. 470. Rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 449. BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 262, ET AL. *v.* GAZZAM, *ante*, p. 532. Rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 542. DUNCAN COFFEE CO. *v.* RECONSTRUCTION FINANCE CORPORATION, *ante*, p. 947. Rehearing denied.

No. 621. WADE ET AL. *v.* MICHIGAN, *ante*, p. 954; and

No. 691. BROWN *v.* ROYALL, SECRETARY OF THE ARMY, ET AL., *ante*, p. 952. Rehearing denied.

Nos. 695 and 696. HANDWORK ET AL., TRUSTEES, *v.* YOUNG, TRUSTEE IN BANKRUPTCY, *ante*, p. 949. Rehearing denied.

No. 697. BERLINSKY *v.* WOODS, HOUSING EXPEDITER, ET AL., *ante*, p. 949;

No. 699. ROWLAND *v.* ARKANSAS, *ante*, p. 952;

No. 721. NELSON ET AL. *v.* JOHNSON, SECRETARY OF DEFENSE, ET AL., *ante*, p. 957; and

No. 754. EMERY TRANSPORTATION CO. *v.* UNITED STATES ET AL., *ante*, p. 955. The petitions for rehearing in these cases are severally denied.

No. 429. TIMMONS *v.* FAGAN, 338 U. S. 904. Motion for leave to file petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 119, Misc. MINTON *v.* BRITTON, DEPUTY COMMISSIONER, ET AL., 338 U. S. 880. Rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 413, Misc. SMITH ET AL. *v.* HOLT ET UX., *ante*, p. 938. The motion to defer consideration is denied. Rehearing denied.

No. 427, Misc. FALKENSTEIN *v.* NEW YORK, *ante*, p. 936. Motion for leave to file petition for rehearing denied.

APPOINTMENT OF MEMBER OF ADVISORY COMMITTEE.

ORDER.

IT IS ORDERED that Maynard E. Pirsig, of Minneapolis, Minn., Dean of the Law School of the University of Minnesota, be, and he hereby is, appointed a member of the Advisory Committee, appointed by the order of June 3, 1935, 295 U. S. 774, and designated as a continuing Committee to advise the Court with respect to amendments or additions to the Rules of Civil Procedure for the District Courts of the United States, by the order of January 5, 1942, 314 U. S. 720, in the place of Wilbur H. Cherry, deceased.

APRIL 24, 1950.

AMENDMENTS OF RULES OF THIS COURT.

ORDER.

IT IS ORDERED that paragraph 7 of Rule 32 of the Rules of this Court be amended so as to read as follows:

"7. In pursuance of section 1911 of title 28 of the United States Code, the fees to be charged by the Clerk of this Court are fixed as follows:

"(a) For docketing a case on appeal or petition for writ of certiorari or docketing any other proceeding, $100.00, to be increased to $150.00 in a case on appeal or writ of certiorari when oral argument is permitted.

"(b) For preparing the record for the printer, indexing the same, supervising the printing and distributing the printed copies to the Justices, the Reporter, the Library, and the parties or their counsel, 20 cents per folio of each 100 words; but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the Clerk's supervision, plus a handling charge of $25.00 in cases in which oral argument is permitted.

"(c) For preparing, on filing, for the printer, petitions for writs of certiorari, briefs, jurisdictional statements or motions when required by the Rules, or at the request of counsel, when, in the opinion of the Clerk, circumstances require, indexing the same, changing record references to conform to the pagination of the printed record, and supervising the printing, 20 cents per folio of each 100 words. Neither the expense of printing nor the Clerk's supervising fee shall be allowed as costs in the case.

"(d) For making a copy (except a photographic reproduction) of any record or paper, and comparison thereof, 40 cents per page of 250 words or fractions thereof; for comparing for certification a copy (except a photographic

reproduction) of any record or paper when such copy is furnished by the person requesting its certification, 10 cents for each page of 250 words or fraction thereof.

"For comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, 5 cents for each page.

"(e) For a certificate and seal, $3.00.

"(f) For an admission to the Bar and certificate under seal, $25.00.

"(g) For a duplicate certificate of an admission to the Bar under seal, $10.00."

IT IS FURTHER ORDERED that this order shall apply to cases docketed on or after May 1, 1950.

APRIL 24, 1950.

ORDER.

IT IS ORDERED that the concluding sentence of paragraph 9 of Rule 13 of the Rules of this Court be amended so as to read as follows:

"The fees of the Clerk under Rule 32, paragraph 7, shall be computed on the folios in the record as printed, and shall be in full for the performance of his duties in that regard."

IT IS FURTHER ORDERED that this order shall apply to cases docketed on or after May 1, 1950.

APRIL 24, 1950.

ORDER RE ATTORNEY'S DOCKET FEES.

The Clerk is directed to abandon the practice of awarding an attorney's docket fee except as provided by statute in admiralty cases.

This order shall apply to cases docketed on and after May 1, 1950.

APRIL 24, 1950.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1947, 1948, AND 1949

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1947	1948	1949	1947	1948	1949	1947	1948	1949	1947	1948	1949
Number of cases on dockets	12	14	13	879	889	867	579	702	568	1,470	1,605	1,448
Number disposed of during terms	0	1	0	772	747	757	567	686	551	1,339	1,434	1,308
Number remaining on dockets	12	13	13	107	142	110	12	16	17	131	171	140

	TERMS		
	1947	1948	1949
Distribution of cases disposed of during terms:			
Original cases	0	1	0
Appellate cases on merits	217	224	201
Petitions for certiorari	555	523	556
Miscellaneous docket applications	567	686	551

	TERMS		
	1947	1948	1949
Distribution of cases remaining on dockets:			
Original cases	12	13	13
Appellate cases on merits	61	76	52
Petitions for certiorari	46	66	58
Miscellaneous docket applications	12	16	17

JUNE 6, 1950.

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